AmTrustee Bhd & Ors v Aldwich Bhd (in receivership) & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-1622–11 OF 2012
LAU BEE LAN J
24 JULY 2017

Companies and Corporations — Bonds — Issue of bonds — Failure to make payment in the revenue account pursuant to bond covenants — Whether first defendant breached bond covenants — Whether third defendant alter ego of first defendant — Whether corporate veil could not be pierced if company's wrongdoing in breach of contract — Whether defendants acted in breach of the Securities Commission Act 1993 — Whether second defendant in breach of trust in failing to pay proceeds of contract into revenue account — Whether third defendant proper party to institute claim for tort of procurement of breach of contract against plaintiffs — Whether fourth defendant negligently performing its duties as lead arranger and facility and security agent — Whether bondholders placed little reliance on information memorandum — Whether sixth defendant as auditor owed duty to fourth defendant — Whether sixth defendant as auditor negligent in conduct — Securities Commission Act 1993

The plaintiffs were some of the registered bondholders of bonds issued by the first defendant, Aldwich Bhd ('Aldwich') pursuant to a bond programme. Aldwich was the wholly owned subsidiary of the second defendant, Aldwich Enviro-Management Sdn Bhd ('AEM') whereas the third defendant, Kamalul Arifin Yusof ('Kamalul') was the substantial shareholder of AEM. The fourth defendant, Maybank Investment Bank ('Aseam') was the adviser and lead arranger, facility agent, security agent (vide the security agency agreement), project agent of the bond programme as well as the primary subscriber and financier of the bonds. The fifth defendant, Mayban Trustees Bhd ('Mayban Trustees') was the trustee appointed vide the trust deed for the bondholders; and the sixth defendant, Ernst & Young ('EY') was the firm of accountants who had carried out the analysis and certification of Aldwich's cash flow projection and assumption for the bond programme and the reporting accountants of Aldwich. In 2002, AEM decided to raise funds through the issuance of private debt securities ('PDS') in bonds and notes to finance the construction of a waste oil refinery ('WOR') plant. For that purpose, AEM had approached Aseam to structure and execute the PDS issuance; incorporated Aldwich to buy over AEM's businesses; and appointed EY to value AEM's businesses. The information memorandum ('IM') in relation to AEM was issued in 2003. On 14 February 2003, Aseam submitted Aldwich's application to the Securities Commission ('the SC') with regard to the proposed issuance of the Aldwich bonds and the SC had approved the same on 4 April 2003. On 13 May 2003,

A Aldwich and AEM entered into two agreements in relation to the proposed transfer of the business (collectively the business, assets and operations associated with catalyst recovery ('CR') and WOR), ie business sale agreements ('BSA'). On 24 June 2003, Aldwich and HSBC Bank USA had entered into an international bullion master agreement ('Aldwich bullion agreement') which B governed all bullion transactions between HSBC Bank USA and Aldwich; and on 26 June 2003, Aldwich and HSBC Bank USA entered into an unallocated bullion accounts agreement ('unallocated bullion agreement') whereby HSBC Bank USA agreed to open and maintain for Aldwich an unallocated account for the deposit of precious metals. The bond consisted of senior bonds ('bonds') C and junior notes ('notes'). Bonds and notes were secured over the assets of Aldwich and subject to a cashflow waterfall priority of payments, by which all monies due to Aldwich would be secured by payment into accounts to which Aseam would be signatory, and used for specific purposes. The cashflow waterfall priority of payment structure and the 'ring fencing' mechanism to D capture all monies paid to Aldwich were essential towards mitigating the bondholders' risk of non-repayment of the bonds. Cash from sale proceeds was to be put into six designated accounts in order of priority ie revenue account, debt service reserve account ('DSRA'), construction account, construction reserve account, escrow account, and disbursement account. Aldwich had E charged the six designated accounts to Aseam as security agent pursuant to the assignment and charge. All payments due to Aldwich were to be captured in the revenue account, from which such monies would flow to the other designated accounts, and finally reach the disbursement account. Aseam as security agent was signatory for all the designated accounts except the disbursement account. F On 26 June 2006, the Ratings Agency Malaysia ('RAM') downgraded Aldwich's bonds due in part to the underperforming WOR plant. In 2009, the plaintiffs discovered a vast difference between Aldwich's expected and actual cashflow positions upon Aldwich's failure to make payment of a periodic and scheduled tranche of bond repayments. As of February 2010, Aldwich had G failed to make seven successive monthly payments into the DSRA, amounting to RM11,666,900. Upon Aldwich's failure to remedy its non-payment of the bonds, a 'Trigger Event' and 'Event of Default' ('EOD') on the bonds were declared. In 2010, receivers and managers were appointed over Aldwich and in 2011, the WOR plant was sold by the receivers and managers for a total H purchase price of RM21,089,505.45. The said sum was paid to the bondholders in part payment of monies due. In 2012, the plaintiffs brought action against: (a) Aldwich for breach of contract and breach of statutory duty; (b) AEM for breach of contract, breach of statutory duty and constructive trust; (c) Kamalul for breach of trust, constructive trust, and breach of statutory I duty; (d) Aseam for breach of contract, negligence, and breach of statutory duty; (e) Mayban Trustees for breach of contract, breach of trust, breach of statutory duty, and negligence; and (f) EY for breach of statutory duty and negligence. In response, the third defendant, Kamalul, filed a counterclaim against the plaintiffs and submitted that the allegedly wrongful declaration of

EOD had caused him, as a junior noteholder, to suffer a loss totaling RM556.5m.

Held, granting judgment for the plaintiffs in the sum of RM177,248,747.31 against the defendants; and dismissing the third defendant's counterclaim with costs:

(1) Based on the evidence, Aldwich had failed: (a) to assign the HSBC Metals Account to Aseam; (b) to credit all the cash flow proceeds in the revenue account; (c) to assign the business contracts and/or secure receipt of the acknowledgment notices relating to the assignment by counterparties; and (d) to make monthly DSRA payments into the DSRA, in breach of the assignment and charge agreement. Further, there was evidence of Aldwich admissions to breaches of bond covenants in three contemporaneous letters to Mayban Trustees dated 11 February 2010, 24 February 2010 and 25 February 2010 (see paras 119–121).

(2) The plaintiffs had established the fact that Kamalul was the alter ego of Aldwich and AEM as Kamalul had substantial shareholdings in and effective control over the companies, in which he made all major decisions as well as signed all the statutory declarations of Aldwich's audited financial statements between 2003–2009 (see para 122).

(3) Based on the authorities cited by Kamalul, there was no mention of the corporate veil might not be pierced 'if the company's wrongdoing is breach of contract'. In any event, there was also plea of impropriety by the plaintiffs on the Kamalul's part. The evidence in the present case clearly demonstrated impropriety in the affairs of Aldwich. Kamalul failed to produce any documentary evidence to establish that the transfer of monies amounting to RM166m and RM16.7m from Aldwich's disbursement account to AEM and Kamalul were legitimate transactions (see paras 123–124 & 126).

(4) The supplemental BSAs had altered the trust arrangement. Thus, the statement in the information memorandum ('the IM') was false and misleading, and did not represent the true state of affairs between AEM and Aldwich. The failure to disclose in the IM the supplemental BSAs, and its effect on the ring-fencing by way of assignment of the business contracts to Aseam also amounted to a material omission by Aldwich, Kamalul, Aseam and EY, in breach of their statutory duties under s 32B(1) and (3) of the Securities Commission Act 1993 ('the SC Act'). In addition, the effect of the limitation clause in the trust deed was never disclosed in the proposal to Securities Commission or in the IM by Aldwich in breach of s 32B of the SC Act. The material omission from the IM also exposed Aldwich to breach of s 38 of the SC Act (see paras 146 & 165).

(5) AEM was obliged to hold all contract proceeds on trust for Aldwich and to pay the same into the revenue account pursuant to the BSAs and/or supplemental BSAs. Aldwich, AEM or Kamalul did not adduce any evidence to show any other payments under the BSAs/supplemental BSAs throughout the bond scheme. Therefore, the irresistible inference drawn was that AEM was in breach of trust and had failed to pay the proceeds of those contracts to Aldwich (see para 150).

(6) The only relevant parties to the security agency agreement and the junior notes trust deed were Aldwich and AEM. Thus, Kamalul was not the proper party to institute the claim for tort for procurement of breach of contract against the plaintiffs. In addition, the junior notes held by Kamalul were always subordinated to the senior bonds. In the circumstances when the bondholders were not able to fully recoup their losses, Kamalul could not be in better position under the trust deed to recover whatever losses allegedly suffered as a result of the non-redemption of the junior notes (see para 189).

(7) The evidence showed the conduct of Mayban Trustees was wanting, lacking 'the professionalism, competence, skill expected of professional trustees'. Mayban Trustees assumed that Aldwich acted in compliance of the trust deed and other bond contracts prior to the issuance of the bonds, which resulted in its failure to take any necessary measures to ensure compliance of the bond contracts and the provisions of the SC Act by the issuer, in breach of Mayban Trustees' obligations under s 82 of the SC Act (see para 205).

(8) As a lead arranger, Aseam was required to ensure that all the information contained in the submission document to SC and in the IM did not contain any false or misleading statements or material omissions. Based on the priority of payment and application of transfer clause in the IM, the revenue account was the only entry point of monies coming to Aldwich. In the present case, only 15% of the Aldwich's proceeds of sales from the CR business were credited into the revenue account, contrary to the above said clause. Further, despite Albar & Partners' (Aseam's lawyer) advice that bonds be issued subject to fulfilment and compliance by the borrower of the outstanding conditions ie, Aldwich to deliver the acknowledgments of the notices of assignment or letters novation to Aseam, Aseam permitted the bonds to be issued without these conditions being fulfilled. In addition, Aseam failed to disclose in the IM that there was a failure to novate and assign the Aldwich bullion agreement and the unallocated bullion agreement. Such failure amounted to a material omission. The bondholders had established their case under ss 32B, 38 and 57 of the SC Act (see paras 218, 220, 222–223, 231 & 235).

(9) Based on the evidence and bearing in mind that: (a) Aseam was the sole signatory to the revenue account, which account was represented and

meant to be the only entry point of all monies coming into Aldwich and solely controlled by Aseam; and (b) the requirement for payments into the revenue account to cascade in the manner of the priority payment (ie waterfall approach/arrangement), Aseam could only fulfill these obligations by monitoring the designated accounts and ensuring that all Aldwich's cashflow proceeds under the BSAs were in fact credited according to the 'ring-fencing' structure prescribed in the IM. Aseam's submission that the monies remitted into the revenue account were not specifically earmarked or impressed with a trust for the sole dominant purpose of repayment of the bonds was flawed as it failed to consider that the monies in the revenue account and the four other designated accounts except disbursement account which formed part of the charged assets were held in trust by Aseam on behalf of the bondholders (see paras 243–244).

(10) For the reasons above, the bondholders had established their case against Aseam for negligently performing its duties as lead arranger and facility and security agent in acting contrary to the terms of the bond contracts. The bondholders had established the statutory cause of action against Aseam under ss 57 and 153 of the SC Act for breaches of ss 32B and/or 38 of the same (see para 260).

(11) The submission by Aseam and Maybank Trustees that bondholders placed very little reliance on the IM could not be sustained. Based on the evidence, although the AAA rating assigned to the senior bonds by RAM was a consideration to the bondholders when purchasing the Aldwich bonds, it was not the only consideration. What was apparent was that the AAA rating by RAM could only be attributed to the tight and strong structural features of the bond as described in the terms of the IM. As for cashflow projections, it was one of the critical factors taken into account by the bondholders in their credit evaluation of the Aldwich bonds. However, nothing turned on such reliance given that the cashflow projections itself formed part of the IM (see para 280).

(12) The plaintiffs had adduced evidence that they trusted in the integrity of the information provided in the IM, and relied heavily on them to obtain an understanding of the structure of the Aldwich bonds and the present and future prospects of the business of the issuer. The market treated the IM as an official offer document and the SC deemed it to carry prospectus liability. Parliament had pursuant to s 38 of the SC Act imposed duty on the key players in the issuance of bonds, including the principal advisor (Aseam) to ensure that statements or information contained in the prospectus was not false or misleading, and that there were no material omissions in the prospectus. The lead arranger could not, in these circumstances, disclaim liability. For the above reasons,

Aseam and Mayban Trustees could not under these circumstances seek to exclude liability by relying on the important notice in the IM (see paras 299–300).

(13) Despite carrying out statutory audits for five years from 2004–2008 and recognising concerns over fraudulent manipulation of documents by Aldwich's management, EY failed to detect the movement of more than RM265m in and out of Aldwich's disbursement account, thus in breach of the trust deed, and which would clearly had affected Aldwich's ability to repay the bonds. For the above reasons, the court found EY negligent (see paras 367 & 371).

[Bahasa Malaysia summary

Plaintif-plaintif adalah beberapa pemegang bon berdaftar bagi bon yang dikeluarkan oleh defendan pertama Aldwich Sdn Bhd ('Aldwich') menurut satu rancangan bon. Aldwich adalah anak syarikat milik sepenuhnya oleh defendan kedua, Aldwich Enviro-Management Sdn Bhd ('AEM') manakala defendan ketiga, Kamalul Arifin Yusof ('Kamalul') adalah pemegang saham substansial AEM. Defendan keempat Maybank Investment Bank ('Aseam') adalah penasihat dan pengatur utama, ejen kemudahan, ejen sekuriti ('melalui perjanjian agensi sekuriti'), ejen projek untuk rancangan bon serta pelanggan utama dan pembiaya bon tersebut. Defendan kelima, Mayban Trustees Bhd ('Mayban Trustees') adalah pemegang amanah yang dilantik melalui surat ikatan amanah untuk pemegang bon; dan defendan keenam Ernst & Young ('EY') adalah firma akauntan yang menjalankan analisis dan pensijilan unjuran dan andaian aliran tunai Aldwich untuk rancangan bon dan pelapor akaun Aldwich. Pada tahun 2002, AEM memutuskan untuk meningkatkan dana melalui pengeluaran sekuriti hutang swasta ('PDS') dalam bon dan nota untuk membiayai pembinaan loji penapisan minyak sisa ('WOR'). Bagi tujuan itu AEM telah berhubung dengan Aseam untuk membina dan melaksanakan pengeluaran PDS; perbadanan Aldwich untuk membeli perniagaan AEM; dan melantik EY untuk menilai perniagaan AEM. Memorandum maklumat ('IM') berkaitan dengan AEM telah dikeluarkan pada tahun 2003. Pada 14 Februari 2003, Aseam menyerahkan permohonan Aldwich kepada Suruhanjaya Sekuriti ('SS') berkaitan dengan cadangan pengeluaran bon Aldwich dan SC telah mengesahkan yang sama pada 4 April 2003. Pada 13 Mei 2003, Aldwich dan AEM telah memasuki dua perjanjian berkaitan dengan cadangan pemindahan perniagaan (secara kolektif perniagaan, aset, operasi yang berkaitan dengan pemulihan pemangkin ('CR') dan WOR), iaitu perjanjian jual perniagaan ('BSA'). Pada 24 Jun 2003, Aldwich, HSBC Bank USA memasuki satu perjanjian master bullion antarabangsa (perjanjian Aldwich bullion) yang mentadbir semua transaksi antara HSBC Bank USA dan Aldwich; dan pada 26 Jun 2003, Aldwich dan HSBC Bank USA memasuki perjanjian akaun bullion yang tidak diperuntukkan (perjanjian bullion yang tidak diperuntukkan) yang mana HSBC Bank USA bersetuju untuk membuka

dan mengekalkan untuk Aldwich satu akaun yang tidak diperuntukkan untuk deposit logam berharga. Bon mengandungi bon senior ('bon') dan nota junior ('nota'). Bon dan nota dijamin atas aset Aldwich dan tertakluk kepada keutamaan bayaran aliran tunai, yang mana kesemua wang terhutang kepada Aldwich akan dijamin melalui bayaran ke dalam akaun yang mana Aseam akan menjadi penandatangan, dan digunakan untuk tujuan khas. Penetapan keutamaan pengaliran wang yang disalurkan ke bawah dan mekanisme 'ring-fencing' untuk mendapatkan kesemua wang dibayar kepada Aldwich adalah penting untuk mengurangkan risiko pemegang bon yang tidak membayar balik bon. Wang tunai dari keuntungan jualan akan diletakkan ke dalam enam akaun yang ditetapkan mengikut aturan keutamaan iaitu akaun hasil, akaun rizab hutang perkhidmatan ('DSRA'), akaun pembinaan, akaun pembinaan rizab, akaun eskrow dan akaun pembayaran. Aldwich telah menggadaikan enam akaun yang telah ditetapkan itu kepada Aseam sebagai ejen sekuriti menurut penyerahhakan dan gadaian. Kesemua bayaran terhutang kepada Aldwich akan diletakkan dalam akaun hasil, dari mana wang tersebut akan mengalir ke akaun lain yang ditetapkan, dan akhirnya sampai ke akaun pembayaran. Aseam sebagai ejen sekuriti adalah penandatangan untuk kesemua akaun yang ditetapkan kecuali akaun pembayaran. Pada 26 Jun 2006, Agensi Penarafan Malaysia ('RAM') menurunkan bon Aldwich sebahagiannya disebabkan oleh prestasi yang kurang baik loji WOR. Pada tahun 2009, plaintif mendapati perbezaan yang besar antara kedudukan aliran tunai jangkaan dan sebenar Aldwich semasa kegagalan Aldwich untuk membuat pembayaran tranche berkala dan berjadual bagi pembayaran balik bon. Sehingga Februari 2010, Aldwich telah gagal membuat tujuh bayaran bulanan berturut-turut ke DSRA, berjumlah RM11,666,900. Setelah kegagalan Aldwich untuk meremedikan tiada pembayaran bon, satu 'Event Trigger' dan 'Event of Default' ('EOD') telah diisytiharkan atas bon. Pada tahun 2010, penerima dan pengurus telah dilantik ke atas Aldwich dan pada tahun 2011, loji WOR dijual oleh penerima dan pengurus untuk harga pembelian berjumlah RM21,089,505.45. Jumlah tersebut dibayar kepada pemegang bon, dalam sebahagian pembayaran wang, yang kena dibayar. Pada tahun 2012, plaintif membawa tindakan terhadap: (a) Aldwich kerana melanggar kontrak dan pelanggaran tugas statutori; (b) AEM untuk pelanggaran kontrak, pelanggaran kewajipan statutori dan amanah konstruktif; (c) Kamalul kerana pecah amanah, kepercayaan konstruktif, dan pelanggaran kewajipan statutori; (d) Aseam kerana melanggar kontrak, kecuaian dan pelanggaran kewajipan statutori; (e) Mayban Trustees untuk pelanggaran kontrak, pecah amanah, pelanggaran kewajipan statutori, dan kecuaian; dan (f) EY kerana melanggar kewajipan statutori dan kecuaian. Dalam menjawab, defendan ketiga, Kamalul, memfailkan tuntutan balas terhadap plaintif-plaintif dan berhujah bahawa dakwaan perisytiharan salah EOD tersebut telah menyebabkan dia, sebagai pemegang nota junior, mengalami kerugian berjumlah RM556.5 juta.

Diputuskan, membenarkan penghakiman untuk plaintif-plaintif dalam

jumlah RM177,248,747.31 terhadap defendan; dan menolak tuntutan balas defendan ketiga dengan kos:

(1) Berdasarkan keterangan, Aldwich telah gagal: (a) untuk menyerahhak Akaun HSBC Metals kepada Aseam; (b) untuk mengkreditkan kesemua keuntungan aliran tunai dalam akaun hasil; (c) untuk menyerahhak kontrak perniagaan dan/atau menerima resit notis pengakuan berkaitan penyerahakan oleh rakan niaga; dan (d) untuk membuat bayaran DSRA bulanan ke dalam DSRA, kerana pelanggaran perjanjian penyerahakkan dan gadaian. Selanjutnya, terdapat keterangan pengakuan Aldwich terhadap pelanggaran perjanjian bon dalam tiga surat yang terjadi pada waktu yang sama kepada Mayban Trustees bertarikh 11 Februari 2010, 24 Februari 2010 dan 25 Februari 2010 (lihat perenggan 119–121).

(2) Plaintif-plaintif telah membuktikan fakta bahawa Kamalul adalah personaliti alternatif Aldwich dan AEM kerana Kamalul mempunyai pemegangan saham substansial dalam dan kawalan efektif ke atas syarikat-syarikat, yang mana dia membuat kesemua keputusan utama dan juga menandatangani kesemua deklarasi statutori penyata kewangan beraudit Aldwich antara tahun 2003–2009 (lihat perenggan 122).

(3) Berdasarkan autoriti yang dirujuk oleh Kamalul, tiada sebutan mengenai tabir korporat tidak akan disingkap 'if the company's wrongdoing is breach of contract'. Walau bagaimanapun, terdapat juga pli yang tidak sesuai oleh plaintif-plaintif oleh pihak Kamalul. Keterangan dalam kes ini jelas menunjukkan ketidaksesuaian dalam hal ehwal Aldwich. Kamalul gagal untuk mengemukakan apa-apa keterangan dokumentar untuk membuktikan bahawa pindahan wang berjumlah RM166 juta dan RM16.7 juta daripada Akaun Pembayaran Aldwich kepada AEM dan Kamalul adalah transaksi yang sah (lihat perenggan 123–124 & 126).

(4) BSA tambahan telah mengubah perjanjian amanah. Maka, kenyataan dalam memorandum maklumat ('IM') adalah palsu dan mengelirukan, dan tidak menggambarkan keadaan hal ehwal sebenar antara AEM dan Aldwich. Kegagalan untuk mendedahkan IM dalam BSA tambahan, dan kesannya terhadap jaminan melalui cara penyerahhakan kontrak perniagaan kepada Aseam juga dikira sebagai peninggalan material oleh Aldwich, Kamalul, Asean dan EY, melanggar kewajipan statutori mereka di bawah s 32B(1) dan (3) Akta Suruhanjaya Sekuriti 1993 ('Akta SS'). Selanjutnya, kesan klausa had masa dalam surat ikatan amanah tidak pernah didedahkan di dalam cadangan kepada Suruhanjaya Sekuriti atau dalam IM oleh Alwich yang melanggar s 32B Akta SS. Peninggalan material daripada IM juga mendedahkan Alwich melanggar s 38 Akta SS (lihat perenggan 146 & 165).

(5) AEM bertanggungjawab untuk memegang kesemua keuntungan

kontrak atas amanah untuk Aldwich dan untuk membayar yang sama ke dalam akaun hasil menurut BSA dan/atau BSA tambahan. Aldwich, AEM atau Kamalul tidak mengemukakan apa-apa keterangan untuk menunjukkan apa-apa bayaran lain di bawah BSA/BSA tambahan sepanjang skema bon. Oleh itu, inferens yang tidak boleh dipertikaikan yang dibuat adalah AEM telah pecah amanah dan gagal untuk membayar keuntungan kontrak-kontrak itu kepada Aldwich (lihat perenggan 150).

(6) Pihak yang relevan kepada perjanjian agensi sekuriti dan surat ikatan amanah nota junior hanyalah Aldwich dan AEM. Maka, Kamalul bukanlah pihak yang sewajarnya untuk memulakan tuntutan tort untuk perolehan pelanggaran kontrak terhadap plaintif-plaintif. Tambahan lagi, nota junior yang dipegang oleh Kamalul sentiasa tertakluk kepada bon senior. Dalam keadaan apabila pemegang bon tidak boleh membayar balik kerugian mereka sepenuhnya, Kamalul tidak dapat berada dalam kedudukan yang lebih baik di bawah surat ikatan amanah untuk mendapatkan semula apa-apa kerugian yang didakwa dialami akibat daripada tiada penebusan nota junior (lihat perenggan 189).

(7) Keterangan menunjukkan tindakan Mayban Trustess mempunyai kekurangan, kekurangan 'the professionalism, competence, skill expected of professional trustees'. Mayban Trustees mengandaikan bahawa Aldwich bertindak mematuhi surat ikatan amanah dan lain-lain kontrak bon sebelum pengeluaran bon, yang mengakibatkan kegagalannya untuk mengambil apa-apa langkah-langkah yang diperlukan untuk memastikan pematuhan kontrak bon dan peruntukan Akta SS oleh pengeluar, dalam pelanggaran kewajipan Mayban Trustees di bawah s 82 Akta SS (lihat perenggan 205).

(8) Sebagai pengatur utama, Aseam dikehendaki untuk memastikan bahawa kesemua maklumat terkandung dalam dokumen serahan kepada SS dan dalam IM tidak mengandungi apa-apa kenyataan palsu atau mengelirukan atau peninggalan material. Berdasarkan klausa keutamaan pembayaran dan permohonan pemindahan dalam IM, akaun hasil adalah satu-satunya pintu masuk wang kepada Aldwich. Dalam kes ini, hanya 15% keuntungan jualan Alwich dari perniagaan CR dikreditkan dalam akaun hasil, bertentangan dengan klausa di atas. Selanjutnya, walaupun atas nasihat Albar & Partners (peguam Aseam) bahawa bon dikeluarkan tertakluk kepada pemenuhan dan pematuhan oleh peminjam terhadap syarat-syarat luar biasa iaitu, Aldwich untuk menyerahkan pengakuan terhadap notis penyerahhakan atau novasi surat kepada Aseam, Aseam membenarkan bon untuk dikeluarkan tanpa syarat-syarat ini dipenuhi. Tambahan lagi, Aseam gagal untuk mendedahkan di dalam IM bahawa terdapat kegagalan untuk menovasi dan menyerahhakan perjanjian Aldwich bullion dan perjanjian bullion yang tidak diperuntukkan. Kegagalan sedemikian merupakan

peninggalan material. Pemegang bon telah membuktikan kes mereka di bawah ss 32B, 38 dan 57 Akta SS (lihat perenggan 218, 220, 222–223, 231 & 235).

(9) Berdasarkan keterangan dan dengan mengambil kira bahawa: (a) Aseam adalah satu-satunya penandatangan kepada akaun hasil, yang mana akaun telah digambarkan dan bertujuan menjadi satu-satunya pintu masuk kesemua wang ke dalam Aldwich dan hanya dikawal oleh Aseam; dan (b) keperluan untuk pembayaran ke dalam akaun hasil untuk membuat bayaran mengikut cara pembayaran keutamaan (iaitu pendekatan/susunan yang disalurkan ke bawah), Aseam hanya boleh memenuhi semua kewajipan dengan memantau akaun yang ditetapkan dan memastikan bahawa semua keuntungan aliran tunai Aldwich di bawah BSA sebenarnya dikreditkan mengikut struktur 'ring-fencing' yang dinyatakan dalam IM. Hujahan Aseam bahawa wang yang diremitkan ke dalam akaun hasil tidak diperuntukkan secara khusus atau ditekankan dengan amanah untuk tujuan utama pembayaran balik bon adalah cacat kerana ia gagal untuk mempertimbangkan bahawa wang di dalam akaun hasil dan empat lagi lain-lain akaun yang ditetapkan kecuali akaun pembayaran yang membentuk sebahagian aset cagaran adalah dipegang dalam amanah oleh Aseam bagi pihak pemegang bon (lihat perenggan 243–244).

(10) Atas alasan-alasan di atas, pemegang saham telah membuktikan kes mereka terhadap Aseam kerana cuai melaksanakan kewajipannya sebagai pengatur utama dan ejen kemudahan dan sekuriti dalam bertindak berlawanan terhadap terma-terma kontrak bon. Pemegang bon telah membuktikan kausa tindakan statutori terhadap Aseam di bawah ss 55 dan 153 Akta SS untuk pelanggaran ss 32B dan/atau 38 Akta yang sama (lihat perenggan 260).

(11) Hujahan oleh Aseam dan Mayban Trustees bahawa pemegang bon kurang bergantung ke atas IM tidak boleh dikekalkan. Berdasarkan keterangan, walaupun penarafan AAA diserahhak kepada bon senior oleh RAM adalah balasan kepada pemegang saham apabila membeli bon Aldwich, ia bukanlah satu-satunya balasan. Apa yang jelas adalah penarafan AAA oleh RAM hanya boleh dikaitkan dengan ciri struktur ikatan yang ketat dan kuat seperti yang dinyatakan dalam terma IM. Berkaitan unjuran aliran tunai, ia merupakan salah satu faktor kritikal yang diambil kira oleh pemegang saham dalam penilaian kredit mereka terhadap bon Aldwich. Walau bagaimanapun, tiada apa-apa terjadi atas pergantungan itu memandangkan unjuran aliran tunai itu sendiri menjadi sebahagian daripada IM (lihat perenggan 280).

(12) Plaintif-plaintif telah mengemukakan keterangan bahawa mereka percaya kepada integriti maklumat yang diberikan dalam IM, dan sangat bergantung kepada mereka untuk mendapatkan pemahaman struktur

bon Aldwich dan prospek perniagaan pengeluar pada masa kini dan akan datang. Pasaran menafsirkan IM sebagai dokumen tawaran rasmi dan SS menganggapnya membawa liabiliti prospektus. Parlimen telah menurut s 38 Akta SS mengenakan kewajipan atas pemain utama dalam pengeluaran bon, termasuk penasihat utama (Aseam) untuk memastikan bahawa kenyataan atau maklumat terkandung dalam prospektus bukan palsu atau mengelirukan, dan tidak ada peninggalan material dalam prospektus. Pengatur utama tidak boleh, dalam keadaan ini, menafikan tanggungan. Untuk alasan di atas, Aseam dan Mayban Trustees tidak boleh di bawah keadaan ini memohon untuk mengecualikan tanggungan dengan bergantung kepada notis penting dalam IM (lihat perenggan 299–300).

(13) Walaupun menjalankan audit statutori untuk tempoh lima tahun dari tahun 2004–2008 dan mengakui kebimbangan terhadap manipulasi fraud dokumen oleh pentadbiran Aldwich, EY gagal untuk mengesan pergerakan lebih dari RM256 juta wang masuk dan keluar daripada akaun pembayaran Aldwich, maka melanggar surat ikatan amanah, dan yang mana akan dengan jelas menjejaskan keupayaan Aldwich untuk membayar semula bon tersebut. Atas alasan-alasan di atas, mahkamah mendapati EY adalah cuai (lihat perenggan 367 & 371).]

Notes

For cases on issue of bonds, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 85–86.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)

Armagas Ltd v Mundogas SA; The Ocean Frost [1985] 1 Lloyd's Rep 1, CA (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Belmont Finance Corporation v Williams Furniture Ltd and others (No 2) [1980] 1 All ER 393, CA (folld)

Ben Hashem v Al Shayif [2008] EWHC 2380 (Fam) (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Boyd Knight v Purdue [2000] 3 LRC 238, CA (refd)

CIMB Bank Bhd v Maybank Trustees Bhd and other appeals [2014] 3 MLJ 169, FC (distd)

CIMB Investment Bank Berhad v Ernst & Young (didakwa sebagai sebuah firma) and another appeal [2014] MLJU 1841; [2014] 6 CLJ 438, CA (folld)

Citibank NA v Law Debenture Trust [2008] 1 BCLC 376 (refd)

Dalkia Utilities Services plc v Celtech International Ltd [2006] 1 Lloyd's Rep 599, QBD (refd)

A *Dato' Ariff Wan Hamzah & Ors v HwangDBS Investment Bank Bhd & Anor* [2013] 1 MLJ 526, HC (folld)
Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd [2007] 244 ALR 552, FC (refd)
Deloitte Haskins & Sells v National Mutual Life Nominees Ltd [1993] AC 774,
B PC (distd)
Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)
Elektrim SA v Vivendi Holdings 1 Corp; Law Debenture Trust Corp plc v Vivendi Holdings 1 Corp [2008] EWCA Civ 1178, CA (refd)
C *Emerald Construction Co Ltd v Lowthian and Others* [1966] 1 All ER 1013, CA (refd)
Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd and Others [1958] 1 All ER 11, HL (folld)
Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on
D *their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773, FC (refd)
JP Morgan Chase Bank and others v Springwell Navigation Corp [2008] All ER (D) 167 (Jun), QBD (distd)
E *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871; [1971] AC 850, HL (refd)
Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd; The Aliakmon [1986] AC 785, HL (refd)
Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors [2015] 3 MLJ 791, CA
F (refd)
Mayban Trustees Bhd v CIMB Bank Bhd and other appeals [2012] 6 MLJ 354, CA (refd)
Mercedes Holdings Pty Limited v Waters (No 2) [2010] 78 ACSR 118, FC (refd)
MIDF Amanah Investment Bank Bhd v Pesaka Astana (M) Sdn Bhd Suit No
G D5(D6)-22–1810 of 2005 (unreported), HC (refd)
Mohamed Tawfik bin Tun Dr Ismail v HLG Credit Sd Bhd & Anor [2012] 2 MLJ 626, CA (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)
H *PlanAssure Pac formerly known as Patrick Lee Pac v Gaelic Inns Pte Ltd* [2007] 4 SLR 513, CA (refd)
Prest v Petrodel Resources Ltd and others [2013] 4 All ER 673; [2013] UKSC 34, SC (refd)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp &
I *Ors* [2009] 2 MLJ 765, CA (folld)
Scruttons v Midland Silicones Ltd [1962] 1 All ER 1, HL (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
UMW Industries Sdn Bhd v Ah Fook [1996] 1 MLJ 365, FC (refd)
White and another v Jones and others [1995] 2 AC 207, CA (refd)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581, PC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 256, 229, 273(1)(d), 276
Civil Law Act 1956 s 4(3)
Companies Act 1965 s 167(1A)
Corporations Act 2001 [AUS] s 601HG(4)
Evidence Act 1950 s 114(g)
Limitation Act 1953 s 6
Offshore Companies Act 1990
Rules of Court 2012 O 14A, O 33, O 40A
Securities Act 1978 [NZ] s 50(2)
Securities Commission Malaysia Act 1993 ss 2, 2(1), 32, 32B, 32B(1), (3), 38, 38(3), 39, 57, 59, 60, 65, 82, 82(1), (1)(c), (1)(g), (1)(k), (1)(l), (1)(m), 85, 85(1), (2), (3), (3)(a), (3)(b), 87, 91, 91(1), 153, Division 3, Schedules 2, 3, Items 9, 10, 11

Tommy Thomas (Alan Gomez, Michelle Kummar and Michael Yap with him) (Tommy Thomas) for the plaintiffs.
V Manokaran (MR Kumar and N Yohendra with him) (Kumar Assoc) for the first, second and third defendants.
Robert Lazar (Lai Wai Fong, TT Toi and Aarti Jeyarajah with him) (Shearn Delamore & Co) for the fourth and fifth defendants.
Kelvin Seet (Vendee Chai with him) (Cheang & Ariff) for the sixth defendant.

Lau Bee Lan J:

PARTIES

[1] The plaintiffs' action against the defendants stems from a bond programme of the first defendant, Aldwich Bhd ('Aldwich') which was arranged by the fourth defendant, Maybank Investment Bank Bhd ('MIBB') (formerly known as Aseambankers Malaysia Bhd ('Aseam')).

[2] Aldwich is the wholly owned subsidiary of the second defendant, Aldwich Enviro-Management Sdn Bhd ('AEM'). The third defendant, Kamalul Arifin Yusof ('Kamalur') (DW1) is the substantial shareholder of AEM.

[3] Aseam was the adviser and lead arranger, facility agent, security agent, project agent of the bond programme as well as the primary subscriber and the financier of the bonds which were issued by Aldwich. The fifth defendant, Mayban Trustees Bhd ('Mayban Trustees') was the trustees of the bond holders as well as the junior note holder, under the bond programme.

[4] The sixth defendant, Ernst & Young ('EY') was the firm of accountants who had carried out the analysis and certification of Aldwich's cash flow projection and assumption for the bond programme and the reporting accountants of Aldwich at all material times.

[5] The first to the fifth plaintiffs are some of the registered bondholders, namely:

(a) the first plaintiff — AmTrustee Bhd ('AmTrustee'), registered holder of Class A senior bonds with a nominal value of RM15m amounting to 5.1% of the total bonds issued;

(b) the second plaintiff — AmNominees (Tempatan) Sdn Bhd ('AmNominees'), registered holder of Class A senior bonds with a nominal value of RM54m amounting to 18.4% of the total bonds issued;

(c) the third plaintiff — CIMB Bank Bhd ('CIMB') registered holder of senior bonds with a nominal value of RM45m amounting to 15.4% of the total bonds issued;

(d) the fourth plaintiff — RHB Nominees Sdn Bhd ('RHB') registered bondholder of Class A bonds with a nominal value of RM5m amounting to 1.7% of the total bonds issued;

(e) the fifth plaintiff — HSBC (M) Trustee Bhd ('HSBC'), registered holder of Class A senior bonds with a nominal value of RM6m amounting to 2.04% of the total bonds issued;

(f) the sixth plaintiff — UniAsia Life Assurance Bhd ('UniAsia'), beneficial owner of Class A bonds with a nominal value of RM10m amounting to 3.41% of the total bonds issued; and

(g) the seventh plaintiff — Employees Provident Fund ('EPF') beneficial owner of Aldwich bonds with a collective nominal value of RM64m amounting to 21.8% of the total bonds issued.

SALIENT UNDISPUTED FACTS

[6] I have drawn the salient undisputed facts from the plaintiffs' submission with some modifications. AEM, the second defendant, was incorporated in Malaysia under the name of Bukit Nanas Enviro-Management Sdn Bhd on 7 September 1995. It changed its name on 16 October 1996. On 17 September 1998, AEM obtained approval from the Department of Environment ('DOE') to operate a catalyst recovery ('CR') plant in Kemaman, Terengganu, which came into operation in January 2001 AEM also began its tank cleaning business around that time.

The IM, issued in August 2003, had described AEM to be 'the only specialized

scheduled waste processor in the Asian region outside Japan capable of recovering multiple precious metals … and is one of the largest scheduled waste recycling, recovery and reuse facility operator, and a provider of environmental related services in Malaysia'.

[7] On 3 November 2000, AEM and HSBC Bank USA entered into an international bullion master agreement ('AEM bullion agreement'), which governed all bullion transactions between HSBC Bank USA and AEM. The agreement defined HSBC Bank USA and AEM as 'Party A' and 'Party B' respectively, and 'Bullion' to include gold, silver and platinum. The base currency for both Party A and B was US Dollars, and a list of Party B's (AEM) bank accounts, where payment and settlement instructions were effected, were listed in Part XII of the Schedule thereto, as follows:

For Party B [i.e. AEM]	
Gold:	Not specified
Silver:	Not specified
Platinum:	Loco: London
	HSBC Bank USA
	Precious Metals
	Thames Exchange
	10 Queen Street Place
	London EC4R 1BQ
Sterling:	Not specified
US Dollars:	HSBC Bank USA, New York
	A/C HSBC Bank USA, London Branch
	Swift Code: B11CU

Hence, payments were to be made in US Dollars, which was the currency of the contract.

[8] Around 2002, AEM contemplated venturing into the business of waste oil refinery ('WOR'), which required the construction of a WOR plant. Needing funds, AEM engaged independent advisors such as Benedict Tan, Harvey Poh and Khoo Siew Bee ('Khoo') to assist it 'in evaluating the financial viability of the expansion programme, ie setting up of the WOR plant'. After considering various options to raise funds, AEM opted for the issuance of private debt securities ('PDS') in the form of bonds and notes to be subscribed by potential investors. AEM also engaged Aseam, the fourth defendant, 'to structure and implement the PDS programme'.

[9] The first defendant, Aldwich was incorporated as a private limited company on 4 December 2002 and was converted into a public company on

10 January 2003. It was fully owned by AEM and was intended to be the special purpose vehicle that would purchase the entire business from AEM, to be funded by the issuance of PDS.

[10] Arthur Andersen ('AA') were the auditors of both AEM and Aldwich from incorporation. Ken Pushpanathan (DW8) was the AA partner in charge of both accounts. He was personally known to Kamalul. After the Enron scandal broke out in 2000, a worldwide merger took place between AA and EY.

[11] A due diligence working group ('DDWG') was set up by Aseam and AEM 'to conduct the Inquiry on behalf of the Lead Arranger and the Issuer to ensure that the information provided has been independent and expertly (where relevant) verified by third parties'. The DDWG comprised the following members and their respective representatives:

(a) issuer – Aldwich	:	Kamalul
		K Mohan Kumar
(b) AEM	:	Kamalul
		K Mohan Kumar
(c) Aseam	:	John Chong
		Mohd Razlan Mohamed
(d) EY	:	Ng Seiw Kuan
		Angela Lee Su Yin
(e) Adnan Sundra & Low (solicitors)	:	Adrian Chee Meng Yang
		Liew Li-Li

[12] The roles and responsibilities of each and every DDWG member in the inquiry process were set out in a document known as the due diligence planning memorandum ('planning memorandum') which is critical to any bond issuance in Malaysia. A draft form of the planning memorandum bearing the date 6 February 2003 (D16/25–70) was prepared by the transactional solicitors, Adnan Sundra & Low.

I find although produced at the trial, none of the parties challenged its accuracy.

[13] A due diligence checklist for the IM found in Schedule 2B to the planning memorandum (D16/47–50) sets out the different sections of the IM and the DDWG member(s) who is responsible therein. Schedule 2C to the planning memorandum is the due diligence checklist for submission term sheet and submission to the Securities Commission (D16/51–54).

[14] EY was engaged by AEM to value its business in August 2002. In a meeting held on 29 August 2002 attended by AEM and EY, it was recorded

that 'AEM will set up a wholly owned subsidiary (SPC) to purchase its businesses of Catalyst and Tank Cleaning', and required EY to do 'a valuation of the businesses to be acquired by the SPC from AEM' (E3/667).

[15] This was followed by a fax of 19 September 2002, whereby Aseam wrote to EY setting out its 'anticipated scope of work required of a Reporting Accountant', including for EY:

(a) to undertake a valuation of the business;

(b) to be a member of the DDWG;

(c) to verify figures extracted from the audited accounts for inclusion in the IM; and

(d) to issue a letter of opinion that includes the cash flow projections and its assumptions for incorporation into the IM (E3/629–630).

[16] By email of 11 October 2002, Khoo (Aldwich's advisor) informed Aseam (E3/590) that the due diligence of AEM's businesses would commence on 25 October 2002. The first 'cut' of the IM was emailed by Aseam to all DDWG members on 23 October 2002 (D16/1).

[17] By email of 29 November 2002 (E3/575), Aseam informed all DDWG members that SC required a legal opinion on whether the ABS guidelines would apply to the proposed issuance. It was also stated in the email that:

> Aseam will also be carrying its own evaluation of the valuation report once received from EY on the enterprise value projected in the report to satisfy ourselves before SC submission of the reasonableness of the cashflow and its assumptions.

[18] By email of 20 December 2002 (D16/3), Aseam forwarded a revised version of the IM to all DDWG members and sought EY's comments on the newly added valuation section. By email of 23 December 2002 (D16/4), EY responded with their comments on section 5 of the draft IM. EY's email reads:

> I (EY) have briefly read Section 5 of the IM which is essentially the extract of the valuation report. Appears OK at the moment. Will do a thorough review once the IM is in its complete form ...

[19] EY prepared an 'Indicative Valuation Report' dated 31 December 2002 ('EY's valuation report') (D1/1–52), the express purpose of which was 'to facilitate AEM and ASB (Aldwich) to determine the transfer consideration for the Proposed Transfer, which will be executed pursuant to the Proposed Structured Private Debt Securities Issuance Programme of ASB'. EY chose the discounted cash flow ('DCF') method (which was the only method mentioned

A in its valuation report) in carrying out its valuation of the business (D1/36), and accepted AEM's required rate of return of 14% for the Class C and D junior notes (D1/39).

B **[20]** EY valued AEM's businesses at RM308.7m for the lower case scenario and RM381.5m for the upper case scenario. The three page Chapter 5 of the IM contains these main points of EY's valuation (D1/41).

C **[21]** By email of 17 January 2003 (D16/9), Aseam forwarded to all DDWG members the latest draft preliminary IM and SC submission package, and reminded them of various outstanding matters.

D **[22]** By letter dated 17 January 2003 (D1/54), Mayban Trustees quoted Aldwich the sums of RM9,000 and RM8,000pa for its trustee services for the senior bonds and junior notes respectively. This was accepted by Kamalul on behalf of Aldwich on 17 January 2003. Mayban Trustees was therefore appointed on 17 January 2003.

E **[23]** By email of 22 January 2003 (D1/10) from Khoo to Aseam and others, EY was requested 'to confirm that (they are) fine with amendment made under the heading Required rate of return by stakeholders under Section 5.2' of the draft IM.

F **[24]** By email of 28 January 2003 from Aseam to all DDWG members (E3/516–517), Aseam highlighted a number of items remaining outstanding from some DDWG members such as the SPA1 and 2 (Aseam and Albar), the final valuation report and cash flow letter (EY), the formal presentation to DDWG on reporting accountant's findings (EY) etc.

G **[25]** On the even date EY issued a letter (C2/683–695) to Aldwich stating, inter alia, that EY reviewed the cash flow forecast and projections prepared by Aldwich (E1/8–18), and concluded that 'nothing has come to (their) attention that causes (them) to believe that the directors' assumptions ... do not provide a reasonable basis from the preparation of the cashflow forecast and
H projections'. This critical letter was included in Appendix 2 to the IM, and in EY's own words, was 'prepared solely for the inclusion of the Information Memorandum and for the submission to the Securities Commission in connection with the Programme and should not be used for any other purposes'.

I **[26]** In a DDWG meeting held on 29 January 2003 (D16/15), Aseam informed all present that 'the purpose of the meeting was for the DDWG to go through the documents for the submission to the Securities Commission ('SC') and to verify the information contained therein'. It was recorded that the

DDWG members had verified their respective parts of the submission term sheet based on the checklist in the planning memorandum, and that Aseam would produce a revised and final draft of the SC submission documents for sign-off at the next DDWG meeting.

[27] By letter dated 29 January 2003 (E3/515), EY requested Aseam to check the wording of EY's letter dated 28 January 2003, 'esp of the scheme wordings of the PDS — so as to be consistent with your (Aseam) SC and IM submission'.

[28] By email of 30 January 2003 (D16/13), Aseam's solicitors, Albar & Partners, suggested to the other DDWG members that:

> item 5, para 3 — although there was a discussion to the effect that a subsequent letter by EY to confirm the valuation for the purpose of the IM would supersede the earlier letter issued by EY for the purpose of verifying the SC submission package, we feel that, after giving some thought to it this, it would be more appropriate if those 2 said letters by EY are issued for the respective specific purposes ie verify SC submission package and IM) and the later letter from EY should not supersede the earlier.

[29] By letter dated 6 February 2003 (E1/6–7), Aseam requested EY to clarify the basis of assumptions with regards to the costing of Aldwich's CR and WOR businesses in two documents prepared by EY: viz EY's letter dated 23 January 2003 and an earlier draft of the valuation report dated November 2002 (E2/404–453). The letter concluded by reminding EY that Aseam as primary subscriber was required to seek the approval of the PDS from SC, and required EY's clarification by 10 February 2003. EY responded to Aseam's queries by its letter dated 7 February 2003 (E1/4–5).

[30] A due diligence report dated 13 February 2003 (D1/55–103) on Aldwich and AEM was prepared by Adnan Sundra & Low. On the even date, Aldwich through a letter signed by Kamalul (B11/2237–2238), declared to the SC that:

> ... after having made all reasonable enquires, and to the best of our knowledge and belief, *there is no false or misleading statement or material omission from the information that is provided* to the adviser or the Commission.
>
> [Aldwich] *will ensure continuous compliance with the stated requirements and conditions imposed by the Commission under the Securities Commission Act 1993 throughout the validity period of the proposed issue, offer or invitation in relation to the private debt securities*. (Emphasis added.)

[31] By letter dated 13 February 2003 (B11/2243), Mayban Trustees declared to the SC that it was eligible to act as trustee for the Aldwich PDS.

A **[32]** On 14 February 2003, Aseam submitted Aldwich's application to SC with regard to the proposed issuance of the Aldwich bonds ('the SC submission') (B11/2219–2243). It was drafted by Aseam. It is to be observed that the important notice (which was subsequently included in the IM) was never mentioned at all and the term sheet and principal terms and conditions, which were submitted together with the SC submission, were never produced at the trial.

[33] By letter dated 17 February 2003 (E3/480), Adnan Sundra & Low forwarded a copy of the verification report and due diligence planning memorandum both dated 13 February 2003 to EY.

[34] By fax dated 20 February 2003 (B11/2244–2245), SC requested, inter alia, a re-submission of Aldwich's declaration as it did not conform to SC's guidelines on the offerings of private debt securities. SC also sought clarification on a number of issues in the term sheet and principal terms and conditions, and requested Aseam to submit the relevant revised pages of the same 'to reflect the necessary amendments'. Aseam responded to SC's queries by its letter dated 28 February 2003 (B11/2246–2279), which also enclosed the revised pages of the term sheet and principal terms and conditions.

[35] By letter dated 10 March 2003 (D16/85–130), Adnan Sundra & Low forwarded a copy of the supplemental due diligence report on Aldwich and AEM to Albar.

[36] On 17 March 2003, all DDWG members signed the verification sheet (D16/144) of the verification report based on a draft IM dated 14 March 2003 (D16/149–319).

[37] By fax of 21 March 2003 (B11/2284–2285), SC sought further clarification on Aseam's SC submission. On the even date (D16/320), Aseam requested Adnan Sundra & Low to forward the draft bond contracts for their vetting. Aseam responded to SC's queries by letter dated 26 March 2003 (B11/2286–2288).

[38] On 4 April 2003, the SC approved Aseam's application as proposed in its SC submission (B11/2292–2294) subject to the following conditions:

(a) Aseam was required to obtain SC's prior approval for any subsequent amendments to the terms and conditions for the issuance of the Aldwich bonds;

(b) Aseam was required to fully disclose all conflicts of interest in the Aldwich bonds to all prospective investors; and

(c) Aseam was required to fully disclose all risk involved in the proposed issuance of the Aldwich bonds and the proposed transfer of AEM's business to Aldwich to all prospective investors.

The SC in the said letter concluded by reminding Aldwich and Aseam that any breach or non-compliance of the principal terms and conditions as approved by the SC, would constitute an offence under the Securities Commission Malaysia Act 1993, and be punishable thereunder.

[39] Before 16 April 2003, the shares in AEM belonged to:

(a) Kamalul	3,026,732	27.44%
(b) Aldwich Industries Sdn Bhd ('AISB')	3,113,885	28.23%
(c) Perbadanan Nasional Bhd ('PNS')	4,888,889	44.33%
(d) Mohd Sofian bin Mohd Ali	1	0.00%
TOTAL	11,029,057	100.00%

On 16 April 2003, PNS sold its entire shareholding in AEM to Kamalul. This meant that by that date Kamalul owned the entire shareholding (except for one share, of AEM) either directly by himself or indirectly by AISB, which was also substantially (99.95%) owned by him (C2/581–582).

[40] On 13 May 2003, Aldwich and AEM entered into two agreements in relation to the proposed transfer of the business (collectively the business, assets and operations associated with CR and WOR), ie business sale agreements ('BSA') 1 (D11/119–164) and 2 (D11/172–221). These agreements documented the underlying transaction that would be financed by the bond proceeds.

[41] BSA 1 deals with the sale of AEM's existing CR and tank cleaning businesses to Aldwich for a consideration of RM119,957,961 (cl 5.1). One of the assets to be sold to Aldwich was AEM's existing contracts (cl 2.1), which were to be novated or assigned from AEM to Aldwich upon the completion of BSA 1. Clause 13, which deals with AEM's existing contracts, reads:

> 13.1 The Purchaser [Aldwich] agrees with the Vendor [AEM] with effect from the Completion Date to assume the obligations of and become entitled to the benefits of the Vendor under the Contracts and the Purchaser shall carry out, perform and complete all the obligations and liabilities created by or arising under the Contracts ...
>
> 13.2 Subject to Clause 13.3 hereof, the Vendor shall on Completion and with effect from the Completion Date, novate to the order of the Purchaser or procure the novation to the order of the Purchaser of all the Contracts which are capable of novation with the consent of other parties.
>
> 13.3 Insofar as any of the Contracts are not assignable to the Purchaser without the agreement of or novation by or consent to the assignment from another party, this Agreement shall not constitute an assignment or attempted assignment if such

A assignment or attempted assignment would constitute a breach of the same and a list of such Contracts shall be provided to the Purchaser on the Completion Date. In the event that consent or novation is required to such assignment —

(a) the Vendor shall, at the Purchaser's request and cost, use reasonable endeavours with the co-operation of the Purchaser, to procure such novation or assignment as aforesaid;

B

(b) unless and until any such Contract shall be novated or assigned as aforesaid, the Vendor shall hold the same in trust for the Purchaser and its successors in title to the Business absolutely and the Purchaser shall (if such subcontracting is permissible and lawful under the Contract in question) as the Vendor's sub-contractor, perform all the obligations of the Vendor under such Contract;

C

(c) ...

(d) ...

D

(e) to the extent that any payment is made to the Vendor in respect of the Contracts on or after the Completion Date, the Vendor shall receive the same as trustee and shall record such payments separately in its books and shall account to the Purchaser for the same on the Completion Date or if received thereafter pay to the Purchaser within fourteen (14) days of receipt.

E

(a) there were two parts to the First Schedule to BSA 1, ie Part A and Part B (D11/143–144). Part A listed 13 existing contracts that were to be novated or assigned by AEM to Aldwich, whereas Part B captures 'all contracts and engagements of AEM entered or to be entered into in the ordinary course of Business after the date of this Agreement but excluding contracts with employees'; and

F

(b) of the 13 contracts listed in Part A, two were of fundamental importance — (i) the AEM bullion agreement referred to in para 7 above; (ii) an agreement entered into between MTBE (M) Sdn Bhd ('MTBE'), a Petronas company, and AEM dated 6 November 2002 ('the MTBE agreement') (C5/1308–1323). In essence, AEM contracted with MTBE to carry out the recovery of platinum or palladium from the spent catalyst generated by MTBE's plant for a 'fee' (cl 3.1). The recovered platinum or palladium would be further refined, for instance by Johnson Matthey, and returned to MTBE through MTBE's account in HSBC Bank USA, London Branch or any other account nominated by MTBE (second recital at p 1310). The MTBE agreement would last for ten years (cl 2.1).

G

H

I

[42] BSA 2 (D11/172–221), deals with the sale of the intended WOR plant from AEM to Aldwich. The purchase consideration for this deal was

RM188,381,000 (cl 10.1). Clause 20 of BSA 2 is similar to cl 13 of BSA 1 (see para 41 above). The First Schedule to BSA 2 was similarly divided into Part A and Part B (D11 at p 199).

There were only two subsisting contracts listed in Part A, one of which was a memorandum of intent between Petronas Dagangan Bhd ('Petronas Dagangan') and AEM dated 18 December 2000 ('MOI') (D9/163–164). Clause 9 of the MOI reads:

> This Memorandum is *to initiate the intent of both parties to pursue discussions and negotiations* to do business with each other for their mutual benefits. It is the *intent of both parties to form a final contract upon reaching an agreement to all the terms required in the final contract*. (Emphasis added.)

I find there is no evidence at this trial to establish that a binding agreement was later entered into between Petronas Dagangan and Aldwich/AEM.

[43] By letter dated 21 May 2003 (B11/2332–2333), Aseam informed SC that Kamalul and Serena Ismail were replaced by Lawrence Low and Rajendra Raj as directors of Aldwich, which would 'further strengthen the case that the sale of AEM's existing businesses/assets to Aldwich is a bona fide sale'. Aseam also informed SC that the signing of the PDS programme would take place on 22 May 2003.

[44] In May 2003, Rating Agency Malaysia Bhd ('RAM') issued its pre-sale report (B1/5–28) on the proposed issuance of the Aldwich bonds, thereby releasing information about the bonds to the public for the very first time. RAM described the structural features of the Aldwich bonds, as follows:

> The preliminary ratings address the likelihood of timely and full payments on the Class A Bonds, Class B Bonds, Class C Notes and Class D Notes by Legal Final Maturity. The ratings also reflect the underlying business and industry risks faced by Aldwich, *supported by the structural features of the transaction to help control for financial, operational and management risks*. The Bonds and Notes are *secured* by a debenture over all of the assets of Aldwich.
>
> Under the *transaction structure*, various *designated accounts will be created to capture all the future cash flow of Aldwich*. The transaction will also be subject to a conservative package of business and financial covenants to isolate it from the corporate risks of AEM. Aldwich's Bonds will be, amongst other restrictions, *subject to minimum coverage tests, cashflow waterfall priority and pre-defined early amortisation triggers to preserve payment capacity*. The *main supporting structural features* of the transaction include:
>
> ° *Current-year and projected minimum annual senior debt service coverage ratio ('DSCR') of 1.5 times*, with any subsequent release of surplus cash to other payments dependent on the meeting of this covenant. A breach of this covenant will result in enforcement over all the assets/businesses of Aldwich and early amortisation of the Senior Bonds.

A

° *A gradual building up of cash reserve to cover debt service and operating expenses. The reserves will be deposited monthly in advance, equal to 1/12th of the respective annual requirements.*

...

B

° *Limitations to the activities of Aldwich with respect to its operations and borrowings.* (Emphasis added.)

RAM also stated:

C

Apart from the above, *additional measures have been taken to ring-fence the transaction structure* from AEM's corporate risk. Together with the minimum performance requirements stipulated, AEM and Aldwich have agreed to the following key covenants:

...

D

(ii) AEM will prepare and present, on behalf of Aldwich, *an annual budget for the operations of Aldwich's businesses. The budget has to be independently certified by the auditors and subsequently approved by the Trustee* for the bondholders.

Other business and performance covenants will include the following requirements and prohibitions:

E

(i) *Any disposal or acquisition of assets by Aldwich may only be conducted with the Trustee and Facility Agent's approval* and upon the fulfilment of specific conditions, eg arm's-length transaction, no adverse impact on the cash flow profile of Aldwich.

F

...

(iii) *The Trustee and Facility Agent will be granted the power to remove and replace the management* upon the occurrence of (i) and (ii) above.

(iv) Monthly reporting of business and financial performance statistics to the Trustee, Facility Agent and RAM.

G

(v) *Submission of Aldwich's annual budget 14 days prior to its financial year-end*. (Emphasis added.)

H

[45] On 1 June 2003, AEM entered into an agreement with Optimal Glycols, another Petronas-related company, and Union Carbide ('Optimal agreement') (C4/1191–1201), whereby AEM would be paid a 'fee' for carrying out the recovery of silver catalyst (cl 3.1). The Optimal agreement falls within the contracts that would be assigned or novated to Aldwich (Part B, First Schedule at p 144). Clause 7B.1 of the Optimal agreement reads:

I

Title to the catalysts which are delivered by OPTIMAL to AEMSB under this Agreement *shall remain with OPTIMAL at all times* and *AEMSB shall not acquire any title, right, lien or other interest* in respect of the same. AEMSB acknowledges and agrees that it is a bailee of the said catalyst and hereby disclaims any title, right, lien

or interest which it may acquire, whether at common law or equity, in respect thereof. (Emphasis added)

[46] The opening of the five designated accounts to be operated and controlled solely by Aseam, which was a key structural feature of the bonds, were put in place in June 2003. Vide Aseam's letter dated 10 June 2003, Aseam informed Aldwich about the authorised signatories for the five designated accounts to be controlled by Aseam: any operations of those five designated accounts would have to be approved by either two signatories from Group A or one from Group A and one from Group B. Saraswathy (DW4) was an authorised signatory in Group B. All the authorised signatories were officers of Aseam.

[47] By letter dated 19 June 2003 from Malayan Banking to Aseam (D15/382), the six designated accounts were allocated the following account numbers:

(a) revenue account: 514011 383217;

(b) DSRA: 514011 383224;

(c) construction account: 514011 383231;

(d) construction reserve account: 514011 383247;

(e) escrow account: 514011 383254; and

(f) disbursement account (to be controlled by Aldwich): 514011 383261.

They were all maintained at Maybank's KL Main Branch.

[48] By notice of assignment dated 23 June 2003 (D10/308–309), Aldwich notified Maybank that it had charged the six designated accounts to Aseam as security agent pursuant to the assignment and charge. Paragraphs 3 and 4 of the notice reads:

3. Subject to paragraph 2 above, we hereby irrevocably authorise and instruct you that, in relation to the *Disbursement Account, upon the notification by the Security Agent that the Assignment and Charge has become enforceable*, notice of which shall be provided to you by the Security Agent, *the Security Agent or any of its appointed representatives are hereby authorised by us to be and shall*, upon the provision of such notice by the Security Agent, *be the sole signatory of such account*.

4. We hereby irrevocably authorise and instruct you to *pay to the Security Agent* (whose receipt shall be a full and sufficient discharge to you for any such payment) *all amounts whatsoever due or owing to us under or by virtue of the Designated Accounts* or the Credit Balances and *to act upon the instructions of the Security Agent in relation to any withdrawals or other matters relating to the Designated Accounts* or the Credit Balances. (Emphasis added.)

[49] Aldwich's notice of assignment was acknowledged by Malayan Banking on 25 June 2003, with Malayan Banking agreeing, inter alia, to:

> (d) procure that payments are made to the Security Agent in accordance with the authority and instruction contained in paragraph 4 of the notice and will, in accordance with paragraph 3 of the notice, only permit amounts to be withdrawn from the Designated Accounts against the signature of an authorised signatory of the Security Agent; and
>
> (e) send to the Security Agent copies of all statements and all notices given by us to the Issuer in connection with the Designated Accounts.

[50] On 24 June 2003, Aldwich entered into an international bullion master agreement with HSBC Bank USA ('Aldwich bullion agreement') (D10/312–350), on the same terms as the AEM bullion agreement alluded to in para 7 above, wherein HSBC Bank USA and Aldwich were described as 'Party A' and 'Party B' respectively. The base currency for both Party A and B was again US Dollars, and a list of Party B's (Aldwich) bank accounts were as follows:

For Party B [Aldwich]	
Gold:	Not specified
Silver:	Not specified
Palladium:	Loco: London HSBC Bank USA Precious Metals 8 Canada Square London E14 5HQ
Platinum:	Loco: London HSBC Bank USA Precious Metals 8 Canada Square London E14 5HQ
Sterling:	Not specified
US Dollars:	*HSBC Bank USA, New York* *A/C HSBC Bank USA, London Branch* *Swift Code: B11CUS33*

(Emphasis added.)

(a) cl 11.11 of the Aldwich bullion agreement reads:

> *Every payment or delivery of Currency to be made* by a Party under the Agreement shall be made in same day (or immediately available) and freely transferable funds *to the bank account designated by the other Party* for such purpose.

(b) the Aldwich bullion agreement contained a non-assignment clause,

which reads:

> 11.2 Neither Party may assign, transfer or charge, or purport to assign, transfer or charge, its right or its obligations under the Agreement or any interest therein without the prior written consent of the other Party, and any purported assignment, transfer or charge in violation of this Section 11.2 shall be void.

[51] On 26 June 2003, Aldwich and HSBC Bank USA entered into an unallocated bullion accounts agreement ('unallocated bullion agreement') whereby HSBC Bank USA agreed to open and maintain for Aldwich an unallocated account for the deposit of precious metals. This agreement similarly contains a non-assignment clause which reads:

> 13.3 Assignment: This agreement is for the benefit of and binding upon us both and our respective successors and assigns. You may not assign, transfer or encumber, or purport to assign, transfer or encumber, your right, title or interest in relation to any Unallocated Account or any right or obligation under this agreement unless we otherwise agree in writing.

[52] By notice of assignment dated 18 July 2003, Aldwich notified HSBC Bank USA of the assignment of the unallocated bullion agreement to Aseam and requested that all payments due to Aldwich under the said agreement be made into the revenue account. Similar notices of assignment were also issued by Aldwich to MTBE (D10/364–365) and Petronas Dagangan (D10/394–395) in relation to the MTBE agreement and MOI respectively as required by the bond programme. I find none of the notices were however acknowledged or consented to by the counterparties, or returned to Aldwich (D10/363, D10/366, D10/396).

[53] By letter dated 4 August 2003 (D1/159–160), Aldwich informed Aseam that out of the 16 AEM contracts that were to be novated to Aldwich listed therein, one contract could 'only be assigned with the consent of the counterpart'.

[54] Aldwich and AEM entered into a second supplemental business sale agreement 1 ('second supplemental BSA 1') (D11/165–171) and a supplemental business sale agreement 2 ('supplemental BSA 2') (D11/222–228) ('collectively known as the supplemental BSAs') on 7 August 2003 to vary the terms of BSA 1 and 2. Clause 2.4 of the second supplemental BSA 1 inserted a new cl 13.4 into BSA 1, the material parts of which read:

> In relation to the Contracts that have not been novated to the Purchaser by the Completion Date ('Pending Contracts') and for so long as such Pending Contracts have not been so novated, the Vendor [AEM] hereby declares that as from the Completion Date it shall hold its benefits rights and interests and title in to and under the Pending Contract on trust for and on behalf of the Purchaser [Aldwich],

A the Purchaser's successors in title to the Business and the Purchaser's nominee(s) absolutely and that as from the Completion Date, the Vendor ceases to have any beneficial interest in the Pending Contracts and the Vendor undertakes with and covenants to the Purchaser that:–

B ...

(k) it will receive all contracts proceeds payable under the Pending Contracts, record such payment separately in its books and account to the Purchaser for the same and shall hold the same in trust for the Purchaser and immediately pay such contracts proceeds into the Revenue Account No 514011383217 opened and maintained by the Purchaser with Malayan Banking Berhad.

C

[55] By letter dated 12 August 2003 (D15/1–14), solicitors Albar wrote to Aseam on the status of the 22 CPs in Schedule 1 of the subscription agreement. In relation to CP 16, which required Aldwich to deliver the acknowledgments
D of the notices of assignment or letters of novation to Aseam, Albar stated:

Other than the Acknowledgments referred to in (c) above, we have not sighted documentary evidence of any other Acknowledgements of the Letters of Novation or Notices of Assignment issued by the Issuer from the relevant Project Agreement Parties.

E

The acknowledgments that were not sighted by Albar included the assignment or novation of, inter alia, the Aldwich bullion agreement and the unallocated bullion agreement with HSBC, the AEM bullion agreement and unallocated bullion agreement with HSBC, the MTBE agreement and the Petronas
F Dagang MOI.

Albar's letter went on to say that:

The *matters outstanding at the time of writing* are as follows:

G 6. the matters referred to in paragraph 16, Schedule 1 of the Subscription Agreement, to the extent of *the sighting of the relevant Acknowledgments of the Project Agreement Parties in respect of Letters of Novation issued by AEM and the Issuer dated 18 July 2003 for the contracts listed in item 16(a) above and the Notices of Assignment issued by the Issuer dated 18 July 2003 for the contracts listed in 16(b) above by way of security*. (Emphasis added.)

H

[56] In such circumstances, Albar advised Aseam that:

Subject to the fulfilment and compliance by the Borrower [Aldwich] of the outstanding conditions stated in paragraphs 2, 9, 10, 11, 13, 16, 18, 19 and 20 of
I Schedule 1 of the Facility Agreement in the manner to your satisfaction, you may in your discretion permit the Borrower to issue the Bonds.

Hence, it was entirely up to the discretion of Aseam to authorise the release of the bonds, and on what date, provided the outstanding conditions had been fulfilled.

[57] The IM was released to all potential investors on 12 August 2003. The verification sheet in respect of the verification report dated 12 August 2003 was circulated to all DDWG members for execution on 13 August 2003. It was expressly stated in the verification sheet that:

> the *signature* of each party opposite his/her name constitutes and *indicates* his/her *confirmation, as a DDWG member, of the accuracy and completeness of the matters stated in the Information Memorandum* for which he or she has been assigned responsibility. (Emphasis added.)

[58] By letter dated 14 August 2003 (B11/2337–2338), Aseam wrote to SC confirming, inter alia, that 'there have been no subsequent changes to the terms and conditions approved by the SC vide its approval letter' (dated 4 April 2003), and that all potential conflicts of interest and risks involved in the proposed issuance of the Aldwich bonds and the transfer of AEM's business to Aldwich were disclosed to potential investors vide the IM. The said letter also enclosed a copy of the IM for lodgement with the SC.

[59] The Aldwich bonds were issued on 15/8/2003 (D16/337), and were purchased by the plaintiffs in the secondary market at various dates.

[60] The net proceeds from the sale of the Aldwich bonds in the sum of RM176,833,961 were utilised in accordance with the manner specified in the IM (C2/662–663):

(a) RM67,834,000 utilised by Aldwich to part finance the purchase of the CR and tank cleaning businesses of AEM;

(b) RM50m on-lent to AEM to part finance the construction of the WOR plant; and

(c) upon completion of the construction of the WOR plant (sometime in January 2005), the remaining sum of RM59,449,961 was to be applied by Aldwich to part finance the purchase of the WOR business of AEM.

[61] By letter dated 21 June 2004 (D1/279–280), EY confirmed: (i) the projected DSCR for FYE 30 June 2005 was 5.54 times; and (ii) there was no actual DSCR confirmation as 'no payments have been made in the previous 12 months on the senior bonds and the first payment (was) expected to be made in August 2004'.

[62] RAM in its review rating dated September 2004 reaffirmed the ratings of Aldwich bonds. RAM observed:

> For FY 2004, *Aldwich's revenue was solely derived from its catalyst-recovery business … The average margin earned is 25%* on the final selling price of the metals recovered …

> *Most (90%) of Aldwich's main suppliers/customers are companies related to Petroliam Nasional Berhad* ('Petronas'). *MTBE Malaysia Sdn Bhd*, a wholly owned subsidiary of Petronas, was its single largest customer in FY 2004, *accounting for 71% of Aldwich's total revenue*. Some of the contracts that have been signed with these Petronas-related companies range between 2 and 10 years, thereby guaranteeing a certain portion of Aldwich's revenue for the next few years. With the contracts on hand and Aldwich's strategic location as well as its specialty in recovering spent catalysts from petrochemical plants, RAM believes that there is minimal supply and demand risk. Although the Company's single-supplier/customer concentration risk is expected to remain high, we take comfort that Aldwich enjoys a strong relationship with Petronas and is formally accredited by the latter. *Though not legally binding*, this should reinforce Aldwich's ability to continue securing contracts from Petronas in the future. (Emphasis added.)

[63] By two letters dated 28 January 2005, Adnan Sundra & Low (D1/281–282) and Aldwich (D1/301) informed Aseam that Aldwich had fulfilled the two key conditions precedent stipulated in BSA 2, namely that:

(i) the WOR plant had commenced operations on 28 January 2005, that is, within 18 months from the issuance date of senior bonds and junior notes, as evidenced by the taking-over certificate issued by AISB (D1/283); and

(ii) Aldwich had secured a long term sales contract (D1/287–299) (defined in cl 8.1(h) of the BSA 2 as 'having a duration of at least 1 year') of 80% of the installed capacity of the WOR plant with one Perusahaan Kimia Gemilang Sdn Bhd ('PKGSB');

and requested Aseam to release the sum of RM59,449,961 held in Aldwich's escrow account to AEM. Aseam acted on this request by transferring that sum from Aldwich's escrow account to AEM's Maybank Account No 012268 301880 on 4 April 2005 (D4/245). RAM's rating announcement on the same day (4/2/2005) (B3/634A) also confirmed this.

[64] By letter dated 31 March 2005 (D1/302), AEM requested Aseam to transfer the remainder RM577m of the Class C and D junior notes to Kamalul. Aldwich only redeemed RM27.5m of the Class C junior notes for the benefit of AEM and/or Kamalul throughout the lifespan of the bonds (D17/527).

[65] It was reported by RAM (B3/635–651) in November 2005 that the WOR plant was not performing to initial expectations due to teething problems in the first few months. As a result, the WOR plant was shut down for three months for process enhancements. It was also reported that a fire had broken out in August 2005 at a segment of the WOR plant, which had caused it to be temporarily closed down. The WOR plant was not operational for a total of eight months in 2005, and only recommenced operations in mid-January 2006.

[66] After the bonds were issued, AEM entered into three other agreements with three other Petronas-related companies for Aldwich's CR business, ie:

(a) agreement for the platinum recovery process between Petronas Penapisan (Terengganu) Gas Bhd ('Petronas Terengganu') and AEM dated 31 July 2005 (D10/486–509);

(b) agreement for the spent catalysts disposal at plant operation division and central utility facilities between Petronas Gas Bhd ('Petronas Gas') and AEM dated 3 July 2007 (D10/515–546); and

(c) agreement for the density grading and platinum recovery of spent catalyst between Petronas Penapisan (Melaka) Sdn Bhd ('Petronas Melaka') and AEM dated 30 November 2007 (C5/1611–1634).

[67] By letter dated 10 June 2005 (D1/303–304), EY confirmed that the actual and projected DSCR for FYE 30 June 2006 were 5.81 times and 2.54 times respectively.

[68] RAM in its transaction performance update of May 2006 (B3/652–653) placed the Aldwich bonds on a ratings watch with a negative outlook due to the 'continued underperformance of Aidwich's waste oil recovery ('WOR'), prompting RAM to revise (their) expectations of the underlying business risks and its accompanying cashflows'.

[69] By letter dated 9 June 2006 (D1/327–328), EY confirmed that the actual and projected DSCR for FYE 30 June 2007 were 2.29 times and 3.42 times respectively.

[70] On 26 June 2006, RAM downgraded Aldwich's Class A and B senior bonds from AAA and AA2 to AA2 and A1 respectively, with a negative outlook. In its rating update issued in July 2006 (B3/654–672), RAM noted that:

> the WOR plant has yet to achieve stable production levels to date, and remains under-utilised due to a shortage in the supply of waste-oil. The downgrading of the ratings of the Class A, Class B and Class C Bonds reflects RAM's concerns about the business risk of the Company, particularly the continued underperformance of Aldwich's WOR business that has affected its risk profile.

On Aldwich's finances, RAM said:

> Elsewhere, Aldwich's cash-conversion cycle had lengthened to 127 days as at 31 May 2006, from the 79 days as end-June 2005. This had been mainly due to lumpy sales, a large portion of which had taken place between January and March 2006. Due to the longer cash-conversion cycle, RAM notes that *the Company had drawn down on RM69.5 million of the RM70 million credit line extended to Aldwich* as at 31 May 2006. Given that the transaction documents stipulate that *Aldwich is only permitted a debt level of RM70 million for working-capital purposes*, the

A Company's working-capital cycle must be managed efficiently to minimise liquidity risk. Nonetheless, liquidity risk has been temporarily moderated through Aldwich's RM47.0 million of cash holdings (net of the credit balances in the DSRA and Disbursement Account) as at 31 May 2006. (Emphasis added.)

B **[71]** By letter dated 28 July 2006 (D17/434), Aseam wrote to Aldwich seeking clarification on concerns raised by one of the bondholders, UniAsia Life (D17/436), on the insufficient supply of waste oil feedstock resulting in the underperformance of the WOR plant.

C **[72]** By letter dated 5 June 2007 (D1/377–378) EY confirmed that the actual and projected DSCR for FYE 30 June 2008 were 2.24 times and 2.71 times respectively.

D **[73]** On 18 February 2008 (D13/87 at p 88), RAM further downgraded Aldwich's Class A and B senior bonds from AA2 and A1 to A1 and A3 respectively, with a negative outlook because of 'Aldwich's persistent difficulty in obtaining waste-oil supply and uncertain tank cleaning opportunities'.

E **[74]** At a bondholders' meeting held on 29 February 2008, it was recorded that 'Aldwich has proposed prepayment of up to RM20.0 Million being next year Senior Bonds' obligation 2008/09' (D13/61 at p 62). In that meeting, one of the bondholders, Mr Kevin Wong of AmInvest (fund management company) proposed the following options to stabilise the Aldwich bond rating:

F
(a) a personal guarantee from Kamalul;

(b) equity injection into Aldwich;

(c) deferral of redemption of the Class C junior notes; or

G (d) conversion of the junior notes into equity.

All of the above proposals were rejected by Aldwich.

[75] By letter dated 6 June 2008, EY confirmed that the actual and projected
H DSCR for FYE 30 June 2009 were 2.08 times and 2.50 times respectively.

[76] The fifth series of the Aldwich bonds totalling RM18m, together with a partial redemption of the sixth series of the Aldwich bonds, totalling RM8m, were redeemed on 15 August 2008.

I **[77]** On 18 December 2003, it was documented in a Maybank Cash Management System for Aldwich's disbursement account (E8/1753) that a sum of RM23,112,358.23 was credited into that account. There was however no such entry on the same day (18 December 2003) in the bank statements of

Aldwich's disbursement account, Sathiavanee (DW5) and Mary Ng (DW6) subpoenaed from Maybank testified that no monies were actually received by their bank.

[78] By letter dated 23 December 2008 (D2/570), Aseam requested Aldwich to explain why it (Aldwich) had only credited cashflow proceeds of RM16,166,667 into the revenue account, when Aldwich's revenue for FYE 2007 was audited as amounting to RM94,476,112. Aldwich replied by letter dated 5 January 2009 (D2/571), stating that not all revenue generated was equivalent to cashflow proceeds: only 15%, being the profit margin of its CR business, was credited into the revenue account.

[79] On the same day (23 December 2008), Rahim & Co issued a certificate of valuation to Aldwich (E12/2635), valuing its Kemaman land 'in its existing condition, with a remaining lease term of about 51 years, free from all encumbrances, with the title being good, marketable and registrable as well as with vacant possession at RM5,300,000.00 (Land only)'.

[80] By letter dated 18 February 2009 (D2/573–574), Aseam again reminded Aldwich that it was required to credit all cashflow proceeds,ie all revenue and income into its revenue account under cl 7(b)(i) of the assignment and charge. In the said letter, Aseam also requested Aldwich to clarify the amounts credited into the revenue account, and to furnish it with the list of business contracts novated by AEM to Aldwich, together with the acknowledgments from the counterparties thereto evidencing their consent to the novation. Aldwich replied by letter dated 27 February 2009 (D2/575–576) but without enclosing any of the required acknowledgments.

[81] By letter dated 26 March 2009 (D2/578), Aseam requested Aldwich to furnish, inter alia, the notices of assignment for the business contracts and its acknowledgments to them. By letter dated 1 April 2009 (D2/580), Aldwich forwarded the notices of assignment and letters of novation (not the acknowledgments) for four Petronas-related companies (Petronas Melaka, Petronas Terengganu, MTBE and Petronas Gas) to Aseam.

[82] During a bondholders' meeting held on 30 April 2009, it was reported that Aldwich had as at that meeting achieved a revenue of RM56,341,000 and earnings before interest, tax, depreciation and amortisation ('EBITDA') of RM9,574,000 (B3/762 at 763). Aldwich also informed the Bondholders that 'they have complied with all the Bonds' covenants and RAM has also reaffirmed their rating on 18/3/2009'. None of the previous correspondences between Aseam and Aldwich on the amounts credited into the revenue account and

A Aldwich's failure to deliver the acknowledgments were disclosed by Kamalul or Saraswathy (who attended the meeting on behalf of Aseam) to the bondholders at this meeting.

B **[83]** By letter dated 18 June 2009 (B3/775–776), EY confirmed that the actual and projected DSCR for FYE 30 June 2010 were 1.85 times and 4.10 times respectively.

C **[84]** By letter dated 29 June 2009, Aseam wrote to Aldwich stating, inter alia, that 'the balance standing in the Revenue Account as at 30/6/2009 was only RM52,932.00 and has been hovering at that level for the past quarter, which (Aseam) deem that the amount does not accurately reflect Aldwich's expected cashflow proceeds as projected in the Annual Budget'. In that letter, Aseam also requested Aldwich to update them on any other subsisting business D contracts with their validity periods and contract value, apart from the four Petronas-related companies mentioned in its letter dated 1 April 2009.

[85] Aldwich replied by letter dated 7 July 2009 ((D2/653–660) stating, inter alia, that:

E

(a) Aldwich had yet to receive the acknowledgments from its counterparties to the notices of assignment and novation delivered on 30 March 2009;

(b) as the amount credited into the revenue account was based on net proceeds and not on a gross basis, only 15% of the proceeds would be F credited into Aldwich's revenue account; and

(c) Aldwich had no other subsisting business contracts apart from the four Petronas-related companies.

G **[86]** By letter dated 20 July 2009 (D2/661–662), Mayban Trustees also informed the bondholders that the balance in the DSRA (controlled solely by Aseam) as at that date was RM11,155,715.98. The DSRA bank statement (as at 31 July 2009) however showed that it only had RM1,571.00 on 20 July 2009. Only two transactions were recorded in that month: a sum of RM1m H was credited into the DSRA on 13 July 2009, and the same amount was debited on the same day.

[87] By letter dated 31 July 2009 (D2/663–664), Aseam wrote to Aldwich I stating, inter alia, that 'the actual total amount deposited into the Revenue Account of RM6.0 million for the period from January to June 2009 differs from the expected Cashflow Proceeds based on the Annual Budget for the same period which projected amount is RM14.6 million', and requested Aldwich to clarify on the revenue received from its WOR business, which had grown 'by

approximately 230% year-on-year based on Aldwich's audited financial statements for the year ended 30/6/2008'. A

[88] By letter dated 4 August 2009 (D2/665–669), Aldwich informed Aseam that they were 'aggressively' pursuing the acknowledgments of the notices of assignment and novation from its counterparties. B

[89] By letter dated 14 August 2009, Kamalul informed Aseam that he had redeemed RM11.255m in Class C junior notes. Given that the revenue account had only RM89,400.24 as at 14 August 2009, Aseam replied to Aldwich on 17 August 2009 (D2/679–682) enquiring as to the source of redemption of the said RM11.255m Class C junior notes. C

[90] By letter dated 21 August 2009 (D2/683), Aseam requested Aldwich 'to remit RM1,666,700.00 immediately in any event no later than August 26, 2009 into the DSRA'. This was the first letter that was issued by Aseam on Aldwich's failure to make the DSRA payment. D

[91] By letter dated 23 September 2009 (D2/689), Aseam wrote to Aldwich stating that it was unable to 'effect the necessary notification/cancellation of the stock with BNM' as it has not heard from Aldwich on the source of redemption of the RM11.255m Class C junior notes. E

[92] By letter dated 30 September 2009 (D2/698), Aseam requested Aldwich to make payment for the DSRA monthly payments for August and September 2009, Aseam's agency fee and BNM annual membership fee. F

[93] By four letters dated 9 October 2009 (D2/696–697), 29 October 2009 (D2/702–703), 16 November 2009 (D2/728–729) and 15 December 2009 (D2/757–758), Mayban Trustees informed Aldwich that its failure to pay its DSRA monthly payments for August, September, October and November 2009 amounted to a 'Trigger Event' as defined in cl 10.1(c) of the trust deed, and demanded that Aldwich make the said four DSRA monthly payments within the 30 day grace period stipulated therein. All these four letters were copied to the bondholders. G H

[94] Despite numerous reminders from Aseam and Mayban Trustees, Aldwich failed to make five successive DSRA monthly payments for August, September, October, November and December 2009, totalling RM8,333,500. I

[95] At a bondholders' meeting held on 21 October 2009 (D13/204), it was recorded, inter alia, that the latest balances in the DSRA and revenue account were RM157,401.07 and RM89,400.24 respectively. At that meeting, one of

A the bondholders, Andrew Leong (PW8), had requested for a set of all the transaction documents. It is only after this request had been made, that the bondholders gained access to the BSAs and bond contracts.

B **[96]** By letter dated 2 November 2009 (D2/712–716), Mayban Trustees informed Aldwich that its failure to obtain the acknowledgements of the notices of assignment was a breach of cl 5.2(b) of the assignment and charge. Despite numerous reminders from Mayban Trustees (D2/737; 759; 765; 776), Aldwich failed to rectify the said breach nor responded to Mayban Trustee's letters.

C

[97] At a bondholders' meeting held on the same day (2 November 2009), it was recorded that 'Is there any reply from the Issuer on the breakdown of the Revenue Account ('RA')? Ms Saras replied that they have yet to receive the acknowledgment of notices and the breakdown of the RA from the Issuer' D (D13/164 at pp 164–165).

[98] By letter dated 4 November 2009 (D2/717–718), RAM wrote to Aldwich stating, inter alia, that RAM had not received all the information it E requested, and warned that should they not receive the requested information by 5.30pm of 5 November 2009, they would suspend the Aldwich bond ratings.

[99] By letter dated 5 November 2009 (D2/720–721), Mayban Trustees F informed SC that Aldwich had failed to make the DSRA monthly payments in breach of cl 7(b)(iii)(B) of the assignment and charge.

[100] By letter dated 6 November 2009 (D2/722–723), Mayban Trustees sought clarification from EY on its computation of the actual DSCR for FYE G 2009. EY however, by email dated 10 November 2009, refused to provide such clarification on the ground that EY was engaged by Aldwich, and would only do so upon obtaining a consent letter from Aldwich, as well as a 'hold harmless' letter from Mayban Trustees.

H **[101]** On 11 November 2009 (D13/168–188), a meeting was held between the bondholders and representatives from Aseam, Mayban Trustees and Albar & Partners. On the same day (11 November 2009), RAM publicly announced their intention of suspending the Aldwich bonds' ratings (B3/933–934).

I **[102]** At a bondholders' meeting held on 18 November 2009, Kamalul informed the bondholders, Aseam and Mayban Trustees that the redemption of the RM11.255m Class C junior notes never took place, and the letter dated 14 August 2009 signed by Kamalul was a 'documentation error' (D2/743 at p 745). Shahir also informed the bondholders, inter alia, that Aldwich had

defaulted two banking facilities of RM70m and RM16m respectively, and that Aldwich would invite EY to attend the next bondholders' meeting (D2/743 at p 745).

[103] A site visit of the CR and WOR plants in Kemaman took place on 6 January 2010, which was attended by some bondholders and representatives from Aldwich, Aseam and Mayban Trustees (D2/872–895). It was recorded in the site visitation report prepared by Mayban Trustees that the WOR plant 'had to be shut down (since July 2009) to avoid losses', and that 'based on the Trustee's observations, there were no workers in the said plant'.

[104] EY, by email of 8 January 2010, stated that they would not be able to attend the upcoming bondholders' meeting, on the ground that they had no legal obligation as auditors of Aldwich to attend such meetings.

[105] As a result of Aldwich's continued failure to make DSRA monthly payments since August 2009, Mayban Trustees forwarded a bondholders' circular special resolution on 24 December 2009 to all the bondholders for the calling of a trigger event. The trigger event was declared on 12 January 2010 (D2/863), the effect of which was that all sums payable under the bonds were due on the next forthcoming legal final maturity date, ie 15 August 2012, and that the floating charge over Aldwich's charged assets (as defined under cl 2.1(b) and Part II of Appendix A of the debenture between Aldwich and Aseam dated 22 May 2003) crystallised into a fixed charge.

[106] Aldwich again failed to make its DSRA payment for January 2010, as evidenced by Aseam's letter to Aldwich dated 14 January 2010. As at 14 January 2010, Aldwich had failed to make six monthly payments totalling RM10,000,200 into the DSRA.

[107] By letter dated 15 January 2010, Aseam informed Aldwich, inter alia, that as security agent, Aseam had exercised its rights under cl 7(d) of the assignment and charge, and became the sole signatory to Aldwich's disbursement account. Aldwich thereupon cease to have control of any of the six designated accounts.

[108] By letter dated 18 January 2010 (D2/900–906), Mayban Trustees particularised Aldwich's breaches of its obligations under the trust deed and assignment and charge, and demanded that it remedy the said breaches, as follows:

(a) failure to submit the audited accounts for the period ended 30 June 2009 thus being in breach of cl 9.1(h) of the trust deed;

A (b) failure to furnish the compliance certificate thus being in breach of cl 9.1(x) of the trust deed;

(c) failure to comply with the build-up requirement into the DSR account thus being in breach of cl 10.4(c) of the trust deed and cl 7(b)(iii)(B) of the assignment and charge;

B

(d) failure to deliver the acknowledgment endorsed on the notices of assignment and letter of novation to the first defendant, thus being in breach of cl 5.2(b) of the assignment and charge;

C (e) failure to, inter alia, forward Forms 24, 44 and 49, the memorandum and articles of association, form of annual return and latest organisation chart, this being in breach of cl 9.1(4) of the trust deed; and

(f) failure to provide the auditor's clarification on the actual debt service cover ratio, thus being in breach of cl 9.1(c) of the trust deed.

D

[109] By letter dated 11 February 2010 (D3/938–944), Aldwich set out its response to the alleged breaches that were particularised by Mayban Trustee in its letter dated 18 January 2010.

E

[110] As at 12 February 2010 (D3/960), Aldwich had failed to make a total of seven successive monthly payments totalling RM11,666,900 into the DSRA.

[111] Pursuant to the special resolution passed by the bondholders on 18 February 2010 (D3/1043–1051), Mayban Trustees declared an event of default ('EOD') on the part of Aldwich. All monies payable under the Aldwich bonds accordingly became immediately due and payable. Aldwich had to immediately pay the sum of RM242,432,497.16, being the EOD redemption value, on 18 February 2010.

F

G

[112] On the even date (18 February 2010), Mayban Trustees also directed Aseam to enforce its rights under the bond contracts, by issuing an enforcement notice to Aldwich (D3/1059–1061).

H

[113] By letters dated 8 March 2010 (C5/1450) and 11 March 2010 (C5/1458), BDO notified Aldwich and AEM respectively of their appointment as receivers and managers.

I **[114]** On 11 March 2010 (B6/1499–1500), RAM downgraded the rating of the Aldwich bonds and notes to Class D.

[115] In or around January 2011, the WOR plant was sold by the receivers and managers for a total purchase consideration of RM21,089,505.45. These

monies were paid to the bondholders on 31 October 2011 in part payment of monies due and owing to them under the bond contracts.

[116] On 17 December 2010, Aldwich commenced a suit against Aseam and the receivers and managers (D22-NCC-2338-2010), contending, inter alia, that Aseam had wrongfully appointed receivers and managers ('Aldwich Suit'). On the same day (17 December 2010), Kamalul also commenced another suit (D22-NCC-2339 of 2010) against Mayban Trustees and Aseam, claiming, inter alia, that Mayban Trustees had wrongfully declared the EOD ('earlier Kamalul Suit'), and that Aseam had wrongfully appointed receivers and managers, thereby prejudicing his rights as Aldwich's junior noteholder. Both suits proceeded to trial and were dismissed by Anantham Kasinather J (as he then was) on 30 September 2011 (B10/2089–2090).

Kamalul thereafter appealed against the decision of the High Court in the earlier Kamalul Suit to the Court of Appeal. On 7 March 2012, the Court of Appeal, by a majority of 2 to 1, dismissed Kamalul's appeal. On 29 April 2013, the Federal Court dismissed Kamalul's application for leave to appeal to the Federal Court.

[117] The causes of action pleaded by the plaintiffs against the defendants are as follows:

(a) Aldwich: breach of contract and breach of statutory duty;

(b) AEM: breach of trust and constructive trust;

(c) Kamalul: breach of trust, constructive trust and breach of statutory duty;

(d) Aseam: breach of contract, negligence and breach of statutory duty;

(e) MTB: breach of contract, breach of trust and breach of statutory duty and negligence; and

(f) EY: breach of statutory duty and negligence.

Kamalul also brought a counterclaim in his capacity as a junior noteholder against the plaintiffs contending, inter alia, that the bondholders' (including the plaintiffs) wrongful act of calling the EOD had caused him to suffer loss in the sum of RM556.5m.

CASE AGAINST ALDWICH

[118] Clause 3.1 of the trust deed (B2/299):

> *The Issuer hereby covenants with the Trustee that* unless previously redeemed, repurchased and cancelled, or otherwise satisfied by the Issuer, *the Bonds will be redeemed in full at nominal value by the Issuer on the respective Expected Maturity*

A *Dates*, failing which the Bonds will be redeemed at their Trigger Event Redemption Value on a date which is not later than the next forthcoming Legal Final Maturity Date after a Trigger Event has been declared. (Emphasis added.)

Clause 11.1 of the trust deed (B2/315):

B If any of the following events shall occur, that is to say:–

(a) *the Issuer makes default in the payment of any money owing in respect of the Bonds and this Trust Deed when the same shall become due and payable* in accordance with the presents (for the avoidance of doubt, the failure to make payment on an Expected Maturity Date is not an Event of Default);

C ...

then the Trustee may, and if so directed by a Special Resolution of the Bondholders shall (subject to its rights under these presents to be indemnified), *declare* (by giving notice thereof to the Issuer) *that all sums payable under the Bonds are*

D *immediately due and payable* at the Event of Default Redemption Value ... (Emphasis added.)

[119] Based on the evidence given during the cross-examination of Kamalul

E on his role in the bonds programme, both pre-bond and post-bond issue, I find Aldwich has failed:

(a) to assign the HSBC metals account to Aseam in breach of cl 3.1 of the assignment and charge agreement. I rely on the following evidence:

F (i) after the bonds were issued in August 2003, Aldwich or AEM operated an account with HSBC London though he was not sure of whether there was one or two accounts;

(ii) the monthly bank statements which HSBC London ought to give to its customer AEM are not available (NP5/Day 21/pp 78–79

G lines 12–22); and

(iii) AEM account in HSBC London was not ring fenced ie not controlled by Aseam as sole signatory and is not among the six designated accounts (NP5/Day 21/p 80 lines 1–19);

H (b) to credit all the cash flow proceeds into the revenue account and wrongfully crediting cash flow proceeds into the disbursement account contrary to the statements in the IM, and in breach of cl 7(b)(i) of the assignment and charge, and cl 9.1(dd) of the trust deed. This can be gleaned from the following evidence: Kamalul agreed that:

I (i) there is a general obligation to comply with trust deed under cl 272(u);

(ii) there is an obligation to maintain and cause all payments to be made in and out of the designated accounts on the terms set out in

the trust deed, the assignment and charge under cl 274(dd) (NP5/Day 20/p 170 lines 1–10);

(iii) monies (cash flow proceeds) generated from the business is supposed to go into the revenue account) (NP5/Day 21/p 42 lines 17–26);

(iv) he has no personal knowledge why 25 bank entries (period from 1 March 2005–30 September 2009) totalling RM83,038,554.88 (for convenience, referred as RM83m) were credited into Aldwich's disbursement account (514011383261) which it controlled and not credited into the revenue account and whether anyone informed this matter to Maybank, Aseam and Mayban Trustees; EY was allowed to have access to all the documents (NP5/Day 22/pp 27–30 lines 22–15);

(v) the revenue of RM9.4m, 5.9m and 6.6m for the years 1999, 2000 and 2001 respectively appearing under para 4.9 'Financial Highlights' of the IM (B3/p 527) represented 100% of revenue) (NP5/Day 20/pp 51–52 lines 26–6);

(vi) looking at wide definition under 'Priority of Payment and Application of Transfer' (C2/650), 100% of revenue and not 15% of revenue is to be put in the revenue account) (NP5/Day 21/p 103 lines 1–13); and

(vii) in addition Ahmad Fhamy Sallehuddin (DW3), the chief operating officer ('COO') of AEM (April 2009) and Aldwich in October 2009 agreed that the eight contracts totalling RM533m represented 100% of revenue and the total revue of Aldwich was RM717m (RM600m (2004–2008) + RM117m (2009)) represented 100% of revenue and not 15%) (NP6/Day 26/pp 44–46 lines 20–5);

(c) to assign the business contracts and/or secure receipt of the acknowledgment notices relating to the assignment by counterparties in breach of cl 5.2 of the assignment and charge. This can be gathered from the following evidence:

(i) Kamalul was shown exh P4, a list of 13 payments credited into AEM Maybank's account for a three year period (July 2006–October 2009) totalling RM1,026,263. When cross-examined, he said that AEM was still receiving as 'trustee' the amounts of money as listed in exh P4 despite the sale of the businesses to the counterparties such as Petronas, MTBE, Optimal and Unicore which will then be put into the Aldwich account. He said he did not personally inform Maybank Trustees of this development) (NP5/Day 22/pp 16–17 lines 7–19); and

(d) to make the monthly DSRA payments into the DSRA in breach of cl 10.1(c) of the trust deed and cl 7(b)(iii) of the assignment and charge. This is clear from the admissions made by Kamalul when cross-examined on Aldwich's letters dated 24 February 2010 (B6/1455) and 25 February 2010 (B6/1461) in response to Mayban Trustees' letter declaring EOD dated 18 February 2010 (B6/1429) and Mayban Trustee' letter dated 22 February 2010 (B6/1431) respectively:

TT The earlier letter [18/2/2010] says that you have to pay within immediately so we will try to pay immediately obviously.

...

KML Yes.

TT And then in para 1, if you can go back to [B]1461 ... This is Aldwich's letter, they say in para 1, 'Non-compliance of the Trust Deed audited accounts. Kindly take note that we have not at any time denied the company is in breach of the terms'. So isn't that in admission that you were in breach of the terms of conditions of the trustee?

KML The letter is quite clear. It said that we have not denied that.

TT Yes. And then likewise paragraph 2. You have not denied that you are in breach of the terms of the Trust Deed or in respect of the annual compliance certificate.

KML No we have not denied that ...

TT And then insofar as the endorsements are concerned, sorry, no before that, para 3.1462, top of the page. 'Failure to comply with the build-up of the DSRA. We were notifying the trustee of the situation faced by the company at this current moment which has resulted in this failure'.

KML Yes.

TT And then, that's again an admission is it not that you've not paid?

KML Yes we agreed that we have not paid into DSRA, ...

TT And then again likewise para 4 on the notices of assignment, you said, 'We wish to draw the trustee's attention the fact that some of these notices had remained outstanding since the issuance of the bonds by the issuer'.

KML Yes My Lady.

TT And then insofar as, page 1463. I think maybe to get it in context, let's go back to the page before. It says at 1462 under para 8, related issues. 'The conduct of the trustee as stated in the letter is reflective of the contentions of the company relating to the trustee'. Then 'Firstly, the current management of the

company discovered that not all the revenue was being credited into the revenue account as required but was instead credited into the disbursement account. This breach was highlighted to the trustee and bondholders during the bondholders' meeting on the 13.01.2010 for the benefit of the trustee and the bondholders. Kindly note that this breach has been occurring since '04 and has not been highlighted by the trustee'. Let's stop there Encik Kamalul. Won't you accept that this is an admission of breach very much along the lines of the bondholders' meeting where, but this time much clearer, that Encik Shahir says, that revenue was credited into disbursement since '04?

KML Yes this is what he said.

TT And then likewise he goes on to say that the requirements to deliver the acknowledgements have not been complied between '04 to '08.

KML Yes.

TT So right from the beginning.

KML Yes that is what he said.

NP5/(NP 5/Day 23/Pages 203–205/Lines 2–13).

[120] As to the reliance of the plaintiffs on the earlier Kamalul Suit and the principle of res judicata arguing that Aldwich is estopped from denying liability in relation to the breaches of the IM and bond contracts, I shall take up this argument when I address Kamalul's counterclaim hereafter.

[121] I find there is evidence of Aldwich admissions to breaches of the bond covenants in three contemporaneous letters to Mayban Trustees as follows.

11 February 2010 (D3/953-957 at pp 954–955) — from Aldwich to Mayban Trustees admitting that they were not able to make the DSRA payment since August 2009 as it was 'facing certain cash flow problems'. In that same letter, Aldwich also stated that 'the current management of the Company is using its best endeavours to identify which third party contracting parties have acknowledged and endorsed the Assignment and Novation Notices to comply with the provisions of the Trust Deed' thereby indicating that it was in breach of the covenant to obtain the acknowledgements to the notices of assignment and letters of novation from the very beginning.

24 February 2010 (D3/1097) — Aldwich wrote to Mayban Trustees noting that an EOD had been called, and further stated that it shall 'where possible comply with payment instructions that will be issued by [Mayban Trustees]' thereby accepting that Aldwich owed the bondholders the redemption value sum of RM242m stated therein.

25 February 2010 (D3/1131 at p 1133) — Aldwich finally wrote to Mayban Trustees admitting that it had breached various terms of the trust deed, including but not limited to, the non-crediting of revenue into the revenue account since 2004.

CASE AGAINST AEM AND KAMALUL

Preliminary points

(i) Whether Kamalul was the alter ego of Aldwich and AEM

[122] The plaintiffs contend that Kamalul was the alter ego of Aldwich and AEM in that he was the directing and controlling mind of both the companies. I find the plaintiffs have established this fact through the following evidence:

(a) Kamalul's substantial shareholding in AEM and effectively owned and controlled the company;

(b) his own admission that all major decisions of AEM could only be taken by him (NP5/Day 20/p 24/lines 14–18);

(c) his own admission that AEM was his company, and he and his wife controlled the board (NP5/Day 20/p 24/lines 20–23);

(d) his own admission that he effectively owned both Aldwich and AEM (NP5/Day 20/p 98/lines 24–27);

(e) his evidence that he was individually responsible for the accuracy and adequacy of the statements made in the IM (NP5/Day 20/p 133/lines 17–33);

(f) the fact that all statutory declarations in Aldwich's audited financial statements for FYE 2003–2009 were signed by him, confirming that Kamalul was 'the officer primarily responsible for the financial management of Aldwich' (E15/pp 3231, 3251, 3283, 3317, 3350 and 3385);

(g) the evidence of Pushpanathan (DW8) when he agreed with counsel for the plaintiffs' suggestion that Kamalul was the 'principal personality of both companies' (NP8/Day 32/p 45/lines 16–29); and

(h) the fact that the WOR plant was constructed by AISB, a related company that was part of the Aldwich Group and owned by Kamalul.

[123] It is appropriate at this juncture to raise the contention of Kamalul that the plaintiffs are wrong in law to pierce the corporate veil as the veil can only be pierced if there is some impropriety of the person in control of the company ie if Kamalul was guilty of some impropriety which is linked to the company's

structure to avoid liability, but not just if the company's wrongdoing is a breach of contract. In support of this proposition, Kamalul relies on the decision of Munby J in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) cited by the UK Supreme Court in *Prest v Petrodel Resources Ltd and others* [2013] 4 All ER 673; [2013] UKSC 34. Kamalul referred to six principles (para 87 p 29 in the first, second to third defendants' written submission) amongst which is 'The corporate veil can be pierced if there is some impropriety, *but not just if the company's wrongdoing is breach of contract*'. I have examined the six principles alluded to by Munby J at p 689 para [25] and the judgment of Lord Clarke SCJ at p 713 para [103] which Kamalul highlighted:

> [103] I agree with the other members of the court that the appeal should be allowed for the reasons given by Lord Sumption. I only wish to add a word on piercing the corporate veil. *I agree that there is such a doctrine and that its limits are not clear*. I also agree that Munby J was correct in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam); [2009] 1 FLR 115 to suggest that the court only has power to pierce the corporate veil when all other more conventional remedies have proved to be of no assistance. It is thus likely to be deployed in a very rare case. (Emphasis added.)

I fail to find any mention of the corporate veil may not be pierced 'if the company's wrongdoing is breach of contract'.

[124] Kamalul further submits that the case of *Prest* was cited with approval in *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773. In this case, the Federal Court determined question 3 (p 808 para [81]) and agreed with the view of the majority in the Court of Appeal who held that on the ground of doing justice exercised the power to lift the corporate veil despite it not being the pleaded case of the claimants but evidence relating the same was adduced that the company concerned was used as an engine of fraud (the majority disagreed with the view of the learned trial judge who declined to do so). Kamalul relies on the following dicta of the Federal Court at p 811 para [96]:

> [96] But in the event that we should, we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality (see *Prest v Petrodel Resources Limited and others* [2013] UKSC 34).

Again I find there is no mention of what Kamalul submits of the corporate veil may not be pierced 'if the company's wrongdoing is breach of contract'.

[125] In any event, I find the plaintiffs have not merely pleaded 'allegations of breach of contract only, by AB [Aldwich]' in putting their case against AEM and Kamalul. The plaintiffs have in fact pleaded 'Kamalul, *as the controlling*

mind of AB and AEM, wrongfully and dishonestly and/or fraudulently and/or in breach of trust directed and caused AB' (see paras 85–87 of the further re-re-amended statement of claim) to commit various breaches of the bond covenants. This is a plea of impropriety on Kamalul's part. To this end counsel for the plaintiffs in cross-examination has put to Kamalul that he caused monies to be diverted out of Aldwich:

> TMT Well, I, I mean, of course we will hear when my learned friend asks you questions about the advances, *but I'm going to put it to you that they are not advances.*
>
> KAMALUL *I disagree*, My Lady.
>
> TMT And I'm going to put it to you that by diverting RM 16.7 million of Aldwich's money, you were depriving Aldwich of that sum which could have been credited into the DSRA.
>
> KAMALUL *I disagree*, My Lady. (Emphasis added.)
>
> (NP5/Day 23/p 49 lines 23–33.)

(See NP5/Day 23/p 122/lines 26–31, NP5/Day 23/p 232/lines 12–28 and p 233/lines 28–31.)

[126] I find the evidence in the instant suit clearly demonstrates impropriety in the affairs of Aldwich. For eg, exhs P5 and P7, which remain unexplained by AEM and Kamalul, show that monies totalling RM166m and RM16.7m were transferred out from Aldwich's disbursement account to AEM and Kamalul respectively. I am of the view whether or not Kamalul directed those payments is irrelevant, because huge sums of Aldwich's monies were proved to have flowed into his personal account or AEM's account, a company which was owned by him. Kamalul failed to produce any documentary evidence to establish that those were legitimate transactions, like *what he claimed* repaying the drawing-down of AEM's Islamic acceptance bill facility or loans allegedly extended by him. Such conduct plainly show that Kamalul wrongfully cause the dissipation of assets and monies out of Aldwich for his personal gain, and to the detriment of the bondholders.

[127] AEM and Kamalul further argued that the plaintiffs should have pursued the conventional remedy of tort of procurement of a breach of contract, as the remedy of lifting the corporate veil should only be resorted to if 'all other more conventional remedies have proved to be of no assistance'. With respect I am of the view this submission is without merit given that the essence of the plaintiffs' claim against AEM and Kamalul is that they had 'directed and caused Aldwich' to commit various breaches of the bond covenants.

(ii) Whether AEM had a monies account with HSBC Bank USA London

[128] Initially (day 20 of the trial), Kamalul when cross-examined on the AEM's bullion agreement where provision is made between Party A (HSBC) and Party B (AEM) agreed AEM have separate conventional banking accounts where monies would be credited to but he agreed he nominated an account in HSBC Bank USA London to accept payment when AEM are to paid for platinum (NP5/Day 20/p 71 line 6 to p 72 line 3).

[129] There was evidence that there were funds in AEM's account with HSBC Bank USA, London based on the evidence adduced during cross-examination by counsel for the bondholders. Kamalul stated 'It's in direct credit into our account' and he agreed that AEM have accounts, banking accounts outside Malaysia into which sale proceeds were credited 'AEM have accounts, banking accounts outside Malaysia into which sale proceeds were credited (in HSBC)'. (NP5/Day 20/p 48/line 27 to p 49 line 25.)

[130] Kamalul also accepted that upon the sale of the precious metals in London, the proceeds of sale would first be credited into AEM's money account with HSBC Bank USA in London, before being remitted to AEM's account in Kuala Lumpur. Kamalul agreed that 'the money is then brought back. AEM's money is brought back from London to AEM Malaysian account'. (NP5/Day 21/p 24 line 24 to p 26 line 30). However three days later (23rd day of trial), Kamalul shifted his position and contradicted himself to the effect that AEM only had a metal (bullion) account in HSBC Bank USA.

[131] The first, second and third defendants in submission stated:

> It is submitted that AEM has produced the bullion agreement with HSBC Bank which clearly show that the dealings AEM has with HSBC Bank is in metal and not in cash.

I observe whilst maintaining in re-examination that 'HSBC does not have a cash account it's only a Metal account'. In cross-examination Kamalul said '[T]his type of contract is actually a metai contract … And because the prices of metai goes up and down according to the market, so, it is a natural hedge for Aldwich to get the fees in terms of metal', and preceding this he has also said 'Well, the proceeds are from the refining, … *can also be in terms of metal*, which will be credited into the AEM or Aldwich's account'. In the light of Kamalul's evidence, I am of the view that the first, second and third defendants' submission is not true given that cll 6.1, 11.11 and Part XII of the Schedule to the international master bullion agreement between Aldwich and HSBC Bank USA clearly contemplates dealings between the parties either in the form of metal or *cash*.

[132] There is the evidence from Saraswathy (DW4), who although maintaining that AEM only had a metals account with HSBC Bank USA, conceded that 'payments' in Aldwich's notice of assignment to HSBC dated 18 July 2003 refer to monies:

> *SARAS Payments [para 4 of the letter] means when bullion is sold, the payments are transferred to Aldwich* because it's a ringgit PDS will be in ringgit. So they will do a conversion and transferred it. Otherwise, the bondholders will be exposed to forex rates.
>
> TMT So when they say payment is money.
>
> SARAS Yes, it's money.
>
> (NP7/Day 28/p 18 line 17 to p 19 line 14.)

[133] I also rely on the evidence of Ken Pushpanathan (NP8/Day 33/p 50 lines 34 to p 51 line 22) and Mary Ng, deputy branch manager of Mayan Banking, Pudu Branch (NP8/Day 30/p 133 line 17 to p 139 line 1) which describes how the monies coming in to a customer's account from a foreign source is treated by the receiving bank in Kuala Lumpur. The first, second and third defendants argued that the fact that HSBC Bank USA was the 'remitter' which remitted the monies to AEM or Aldwich's account is clear evidence that they had no such monies account. They capitalised on the following evidence of Mary Ng:

> TMT Ok. So, first of all, would you confirm that TT is Telegraphic Transfer?
>
> MARY Yes.
>
> TMT Would you know what BO means?
>
> MARY By Order.
>
> TMT By Order? Ok. By Order of whom?
>
> MARY Correct.
>
> TMT Who is making the order?
>
> MARY By Order it should be the remitter.
>
> TMT Remitter? Ok. So now I know, straightaway I am talking to somebody in the industry because you are using the right term, remitter.Ok. So here would you confirm the remitter is HSBC Bank USA?
>
> MARY Yes.

With respect I am of the view that Mary Ng's evidence has to be viewed in context, namely, (i) Mary Ng has no personal knowledge of AEM or Aldwich's account with HSBC Bank USA; and (ii) in answering the question posed by

Counsel for the Plaintiffs, she was merely testifying on a particular remittance of the 'missing' RM23m in Aldwich's Maybank Cash Management System (E8/1753).

[134] Given the matters which I have alluded to, I am incline to accept the plaintiffs' submission what transpired is this:

> What was remitted out from AEM's HSBC Bank USA in London [Remitter] to AEM's Maybank Account in Kuala Lumpur [Receiving Bank] was foreign money, in this case, US Dollars. Those sums of monies would only be converted into Ringgit by the receiving bank in Malaysia. Thus, Kamalul's second version that AEM only had a metals account in London simply cannot be true because monies realised from the sale of precious metal, in US Dollars, would first have to be credited into a *monies account with HSBC Bank USA London*, before it was remitted back into AEM's Maybank Account in Kuala Lumpur. *This also accords with common sense and business logic.*

[135] The above position is bolstered by exh P3 which clearly shows that sale proceeds from the CR business worth RM83m were remitted into Aldwich's disbursement account; and not that metals were remitted from HSBC Bank USA London to AEM or Aldwich. It is unfortunate that despite all the discovery orders made by court, yet AEM and Aldwich failed to produce any documents/statements to show how much proceeds were realised from the sale of those precious metals. Since AEM and Kamalul have failed to account for, inter alia, all the proceeds from the CR business, I am I persuaded to invoke s 114(g) of the Evidence Act 1950 against Aldwich and AEM, ie, these documents if produced would draw an unfavourable inference against Aldwich and AEM.

BONDHOLDERS' PRINCIPAL COMPLAINTS AGAINST AEM AND ALDWICH

(a) Failure to disclose supplemental BSAs

[136] In reply thereto, Aldwich submits that the only allegation by the plaintiffs against Aldwich of non-disclosure in the IM is in respect of the supplemental BSAs and this allegation of non-disclosure of the supplemental BSAs was not pleaded by the plaintiffs.

[137] I find this is not fatal to the plaintiffs' case because a substantial body of evidence on this point was led in without any objection: see the decision of the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at pp 342B–343C.

[138] Aldwich also contends that the cross-examination of Kamalul by counsel for the plaintiffs referred to in para 264 of 'I' (the plaintiffs' principal submission) does not deal with this point at all.

[139] Paragraph 264 of 'I' reads:

TMT So that's all I need for the time being and then I'll get the list, right, and then to confirm. And then My Lady, now I'm moving on to. No, still on post bond. So Encik Kamalul, you realise that all these payments, so there were 13 of them, 5 of which I've actually shown you and the others you had accepted, ranging from July '06. The first one was July '06 MTBE and the last one is October '09. The question I have for you is *how would you explain to the court that AEM is receiving these amounts of money in its Maybank account when it has already sold these businesses to Aldwich and therefore, should not be receiving any money?*

KAMALUL My Lady, what actually happened in this particular case was that some of the contracts that we tried to assign to the bond programme, Petronas has refused to do that. So AEM My Lady, in effect, it's the, because, I use the word trustee I guess, in this particular case, is a trustee for those monies that comes in and, into AEM account which then will be put into the AB account, I think after this.

YA Put into the?

KAMALUL Well, the money flow My Lady, *because of the contracts are still with AEM. Because the Petronas do not want to assign that particular contract*.

YA Alright.

KAMALUL *So the payment effectively will come into AEM account and then that money then will be transferred into AB account.*

TMT *Now you would then also confirm that this AEM account that we're talking about in Maybank is not one of the 6 designated accounts controlled by Aseam?*

KAMALUL *Yes*, My Lady.

TMT Now did you, because the first item of this payment is 14.07.2006 that is the MTBE payment which I've showed you for RM224,000.00. 14.07.2006, that happened. The question I have for you is did you in July, at the end of July, that means after you received this payment, end of July '06, *did you notify Aseam as the lead arranger and the trustee because the trustee also has a role, Mayban Trustee, of this development? That you were receiving, AEM was receiving this money because the contracts were not being assigned by the Petronas Group?*

KAMALUL I have no personal knowledge on that, My Lady.

TMT It's okay. I'll ask you personally first. *Personally, did you inform?*

KAMALUL I have no personal knowledge. So I.

TMT No.*Did you personally inform?*

KAMALUL *No, I didn't.*

TMT Now next question is *do you know whether anybody else in either AEM or Aldwich informing Aseam and Mayban Trustees of it?*

KAMALUL I. My Lady, *I cannot say for sure but I believe our Finance Department at that time would have informed Maybank, well the Aseam Bankers with regards to the operations of the accounts.* (Emphasis added.)

(NP5/Day 22/p 16 line 1 to p 17 line 26.)

[140] With respect I disagree with Aldwich's contention. I find the cross-examination reproduced at para 264 of 'I' above establishes that Aldwich, AEM and/or Kamalul had failed to disclose to SC the fact that AEM (and not Aldwich's — revenue account) received the proceeds of most of the business contracts that were supposed to be novated or assigned to Aldwich and subsequently assigned to Aseam. The fact remains, however, that SC was never informed of the supplemental BSAs, nor were they disclosed in the IM, as admitted by Aldwich, AEM and Kamalul in paras 28 *(sic)* and 29 *(sic)* of 'J2' (the first, second and third defendant's outline of reply) which are reproduced:

> 28. There would also be no necessity to disclose the Supplemental BSA *(sic)* in view of the fact that there would be no adverse repercussion.
>
> 29. Even if the Supplemental BSA *(sic)* had been disclosed, MTBE and Petronas would still have paid monies into AEM's account as they had refused to assign the contracts and the original trust provision in the BSA would have kicked in.

[141] AEM and Kamalul relied on cll 13.3 and 13.4 of the supplemental BSA 1 (similar to cll 20.3 and 20.4 of supplemental BSA 2) and submitted that because the supplemental BSAs 'merely expands on the workings of this trust arrangement', 'there is no material change to the obligation of AEM to procure the novation or its duty to hold the benefit of the said contracts in trust in the meantime' and 'there could be no adverse repercussion [to] the [Plaintiffs'] interest'.

[142] I find the aforesaid submission of Aldwich and Kamalul is not altogether accurate. For example, I refer to the provision of *cl 13.4(k)* of the supplemental BSA 1 (similar to cl 20.4 (k) of the supplemental BSA 2 which I have reproduced at *para 54 pp 22–23* above.

[143] The trust arrangement was disclosed in para 8.1 of the IM, which reads:

A ... *The transfer of the businesses will occur on the fourteenth (14th) Business Day from the date the last of the conditions precedent is met* or such other date as may be agreed. As at the date of this Information Memorandum, *BSA1 has become unconditional* and the *parties have set 18 July 2003 as the date of transfer of the businesses and the contracts are in the process of being novated. Pending the novation, the benefits and rights* B *of such contracts will be held in Trust by AEM for the Issuer*. (Emphasis added.)

[144] CPs 18 and 20 of the IM also state:

18. *Confirmation* from the Legal Counsel for the Lead Arranger *that all the* C *conditions precedent pertaining the issuance of the Senior Bonds* and Junior Notes *have been fulfilled*.

20. *Evidence of the consent*, where relevant, *from the respective counterparties of the contracts to be assigned to the Security Agent* pursuant to the paragraph bearing the heading 'Security' and that *notices of such assignment have been served and the* D *acknowledgment of such notices duly received.*

[145] I am incline to agree with the plaintiff's submission that any reasonable reader of the IM reading para 8.1 together with CPs 18 and 20 would form the impression that:

E

(i) BSA 1 had become unconditional;

(ii) AEM would transfer its business under BSA1 to Aldwich by 18/7/2003;

(iii) these business contracts were in the process of being novated;

F

(iv) pending such novation, the benefit and rights of such contracts would be held in trust by AEM for Aldwich; and

(v) in any event, these business contracts would be assigned by Aldwich to Aseam before the bonds were issued on 15/8/2003 (CP 20).

G

[146] Therefore I am of the view that the process of novation was *to be completed prior to the issuance of the bonds as only after the business contracts were novated from AEM to Aldwich would they be capable of being subsequently assigned by Aldwich to Aseam*. However the supplemental BSAs have altered the H trust arrangement to keep the completion time of the novation process at large and destroys the protection and rights that would have been accorded to the plaintiffs by the assignment of these business contracts to Aseam. Thus I find that that statement in the IM is false and misleading, and does not represent the true state of affairs between AEM and Aldwich. The failure to disclose in the I IM the supplemental BSAs, and its effect on the ring-fencing by way of assignment of the business contracts to Aseam *also amounts to a material omission by Aldwich, Kamalul, Aseam and EY, in breach of their statutory duties under s 32B(1), and their continuing obligation under s 32B(3) of the SC Act*.

(aa) Non-disclosure of the fact that not all AEM's contracts were assigned or novated to Aldwich

[147] Counsel for AEM and Kamalul submits that because the assignment and/or novation process required more time, 'it would therefore be premature for AEM to make an announcement in the IM on the status of the contracts that had not yet been assigned at that stage'. With respect this argument is untenable when gauged against Section 32B(3) of the SC Act, which reads:

> Where —
>
> (a) a statement or information referred to in subsection (1) has been submitted or provided to the Commission, or a conduct referred to in subsection (1) has been engaged in; and
>
> (b) *a person referred to in that subsection becomes aware before the proposal has been fully implemented or carried out* —
>
> (i) *that the statement or information may be false or misleading or materially incomplete;* or
>
> (ii) that the conduct may tend to mislead or deceive,
>
> *the person shall forthwith advise the Commission of the facts referred to in subparagraph (b)(i) or (b)(ii)*, where applicable, and shall take such action as the Commission may require pursuant to subsection 32(7). (Emphasis added.)

The aforesaid provision mandates that as soon as Aldwich, Kamalul and/or Aseam were aware of the non-assignability or non-assignment of some of AEM's contracts, it was incumbent on them to disclose that very fact to the SC. I find the failure to do the same constitutes a material omission which has prejudiced the plaintiffs by being denied the ring-fencing and security protection afforded by the assignment of those business contracts to Aseam and recourse against those contracting parties in the event the proceeds of those contracts were not paid into the revenue account.

(b) AEM and Kamalul caused Aldwich to make payments that were in breach of the bond contracts and contrary to the statements in the IM

[148] AEM and Kamalul submit that the plaintiffs never pleaded or alleged that any of those payments in respect of the four transfers (addressed below) were made dishonestly and/or fraudulently and/or unlawfully. This contention is without any merit as discussed in paras 125–126 above coupled with the fact that a substantial body of evidence on these transfers were also led in without any objection (see *Boustead Trading*).

(i) Transfer of RM166mfrom Aldwich disbursement to AEM's account

[149] Kamalul in re-examination claimed that the RM166m transfers was to repay BA facilities extended by AEM to Aldwich. For such a huge sum of money involved, I find it hard to believe Kamalul's evidence bearing in mind Kamalul admitted he was involved in all major decisions of Aldwich and AEM, yet he stated he did not authorise and neither was he consulted about the transfers; according to him from March 2008–October 2009, Anas, the Chief Financial Officer of Aldwich, had authorised 32 separate transfers of monies totalling RM166m from Aldwich's disbursement account (controlled solely by Aldwich) to AEM's account (not a designated account), which are listed in exh P5 (NP5/Day 23/p 34/lines 15–27). As urged upon the court by the plaintiffs I am incline to invoke s 114(g) of the Evidence Act against the first, second and third defendants for failure to call Anas as a witness to give evidence on the repayments ie if called, he would give evidence adverse to Kamalul's version.

(ii) Transfer of RM18m from AEM's account to Aldwich's disbursement

[150] There were only two transfers of monies totalling RM18m listed in exh P6 from AEM's account (not a designated account) to Aldwich's disbursement account (controlled solely by Aldwich) again authorised by Anas for the whole period from 2003–2009 and he claimed he did not know the purpose of the two payments. I am mindful that most of AEM's contracts were neither assigned nor novated to Aldwich, and subsequently assigned to Aseam: AEM was obliged to hold all contract proceeds on those contracts on trust for Aldwich and to pay them into the revenue account pursuant to the BSAs and/or supplemental BSAs. I find Aldwich, AEM or Kamalul did not adduce any evidence to show any other payments under the BSAs/supplemental BSAs throughout the bond scheme. Therefore the irresistible inference drawn is that AEM was in breach of trust and had failed to pay the proceeds of those contracts to Aldwich.

(iii) Transfer of RM16.7m from Aldwich disbursement to Kamalul

[151] According to Kamalul on the instructions of Anas, monies totalling RM16.7m (exh P7) were transferred out from Aldwich's disbursement account (solely controlled by Aldwich) to Kamalul personally. Kamalul testified that those payments were not in respect of the junior note redemption, but were repayment of loans extended by him to Aldwich from time to time.

[152] Counsel for the first, second and third defendants submits that '[No] allegations were made against Kamalul that the monies were fraudulently or unlawfully paid to him, there was no necessity for Kamalul to show that the

monies were legitimately paid to him through the production of accounts and documents'. I disagree. Counsel for the plaintiffs did put to Kamalul that the transfers of RM16.7m were not 'loans' extended by him to Aldwich, and that he had diverted those monies for his personal gain (see paras 125–126 above). Kamalul's failure to produce any documentary evidence of the purported loans warrants the court to draw an adverse inference under s 114(g) against Kamalul that there are no such documents because there was no such 'loans' extended by him to Aldwich.

(iv) Transfer of junior notes from AEM to Kamalul

[153] In cross-examination Kamalul agreed for the sale of the businesses of AEM of RM308m (rounded figure), AEM was to be paid RM176m from the bond proceeds. The balance of RM132m was in the form of junior notes issued by Aldwich to AEM. When asked what was the consideration for the transfer of the junior notes to him, Kamalul said 'There is agreement between, well there is an understanding between AEM and myself, between the Board and me that I will have to pay it [AEM] at some later stage'. Whilst agreeing there is a conflict of interest position as he was personally going to inherit the junior notes vide transfer from AEM, a company controlled by him, he refused to agree that it was not an arm's length transaction. It is not disputed that Kamalul has received RM27.5m redemption as junior noteholder.

[154] Counsel for the first, second and third defendants submit 'For the plaintiffs to succeed in establishing that AEM and Kamalul held monies in trust, the plaintiffs must first prove that AEM and Kamalul were holding monies belonging to AB'. In the light of the aforesaid evidence the plaintiffs have led evidence which show that 'AEM and Kamalul were holding monies belonging to Aldwich'. I am incline to accept the plaintiff's submission that AEM and Kamalul held the monies from the business contracts and/or Aldwich on constructive trust for the benefit and on behalf of the bondholders which the bondholders are entitled to trace. I rely on *Belmont Finance Corporation v Williams Furniture Ltd and others (No 2)* [1980] 1 All ER 393 at p 405c–d, where the English Court of Appeal (per Buckley LJ) stated:

> In this Court, the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee.

Defence of Alwich, AEM and Kamalul

IM is not a contract

[155] By way of defence, Aldwich contends the plaintiffs have no claim against Aldwich under the IM as the IM is a form of invitation to treat; it is not a contract and any allegation of breach of contract in relation to information in the IM as against the first, second and third defendants is misconceived and wrong in law. With respect I find Aldwich's submission is misplaced for these reasons.

[156] In submission the plaintiffs concede that IM is not a contract; hence they are not asserting that the IM is a contract and neither has the plaintiffs pleaded breach of contract based on the IM. The plaintiffs' pleaded case against Aldwich is for: (i) breach of the *bond contracts* (also collectively called the *transaction documents*'); and (ii) for breach of statutory duty and covenants pertaining to the IM as I have alluded to above in paras 118–121 above.

[157] The plaintiffs argue they have pleaded, and proved that there were false and/or misleading statements in the proposal submitted by Aseam on behalf of Aldwich to the SC pursuant to s 32 of the SC Act; that there were false and/or misleading statements and material omissions in the IM and in consequence, the plaintiffs may recover the entire amount of its loss and damage from, inter alia, Aldwich, Kamalul, Aseam and EY, pursuant to ss 57 and 153 of the SC Act which will become apparent later.

No locus standi to sue Aldwich

[158] Aldwich contends that the plaintiffs do not have the right to institute this action on these grounds:

(a) Aldwich's obligations to comply with the trust deed and the transaction documents as a whole is owed to Mayban Trustees only and not to the bondholders relying on particularly the phrase 'The issuer [Aldwich] hereby covenants with the Trustee ...' appearing in cll 3.1, 9.1(u) (under the heading of positive covenants) and 9 (under the heading of negative covenants);

(b) it is only Mayban Trustees which can institute the action as the trustee is vested with the power to declare a trigger event for any of the breaches under cl 10(a)–(l) and declare an EOD for any of the breaches under cl 11.1(a)–(r), particularly, cl 11(c); and primarily on cl 12.4 of the trust deed read with cl 27 of the trust deed that 'the terms and conditions of the Trust Deed are binding on the Trustee, the Issuer and each Secured Party' and bondholders being 'Secured Parties' under the security agency

agreement ('SAA') to support their argument that 'only [Mayban Trustees] may pursue the rights and remedies available under the general law or under the Trust Deed to enforce the rights of the bondholders'. Clause 12.4 reads:

> Only the Trustee may pursue the rights and remedies available under the general law or under this Trust Deed to enforce the rights of the Bondholders *against the Issuer* and no Bondholder shall be entitled to pursue such remedies *against the Issuer* unless the Trustee, having become bound to do so in accordance with the terms of this Trust Deed, fails to do so after the expiry of thirty (30) days from the date of the Trustee having become bound to do so.

(c) cl 12.4 of the trust deed does not remove the plaintiff's right to commence the instant suit nor remove their access to justice contrary to the plaintiffs' contention; but 'that access is through [Mayban Trustees]' and 'the Bondholders are bound by the terms of the contract [procedure to institute an action]'; and

(d) Aldwich seeks to draw an analogy between cl 12.4 and derivative actions under company law. Aldwich relies on *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 and submits that 'Case law in derivative action cases has held that not complying with the requirement to ask the directors to institute proceedings against themselves before resorting to a derivative action is fatal' Aldwich further submits by analogy, the plaintiffs' claim against Aldwich is unsustainable because of non-compliance of cl 12.4.

[159] At the outset it is my respectful view that cl 12.4 has no application in circumstances where Mayban Trustees acted, inter alia, in breach of trust and in breach of contract resulting in Mayban Trustees themselves being sued as the fifth defendant in this suit. With respect I cannot agree with the first, second and third defendants' submission 'it would not be a ridiculous proposition in law that the trustees are required to bring action against themselves with the Bondholders as the plaintiffs'.

[160] Be that as it may, in my judgment the derivative action analogy canvassed by the first, second and third defendants is flawed for two reasons succinctly given by the plaintiffs:

> First, the requirement that a complainant must give 30 days' notice in writing to the directors of his intention to commence a derivative action is provided for by statute (see s 181B(2) of the Companies Act 1965), as opposed to a term of a contract (as in cl 12.4 of the trust deed in the instant case).

At the highest I agree the plaintiffs' non-compliance of cl 12.4, is a mere breach of a warranty, which does not preclude the plaintiffs from maintaining this suit.

A Secondly, under common law (which is not abrogated by virtue of s 181A(3) of the Companies Act 1965) there is no requirement for a plaintiff to give notice to the directors of his intention to sue prior to commencing a derivative action.

B **[161]** Aldwich further submits that the plaintiffs could have instructed Mayban Trustees to sue Aldwich, AEM and Kamalul, and proceeded to sue Mayban Trustees directly if they are of the view that Mayban Trustees cannot in law be asked to sue themselves. In this regard I reject Aldwich's argument for the two reasons which the plaintiffs submit:

C [T]he Plaintiffs pleaded breach of contract, breach of trust and breach of statutory duties against Aldwich, AEM,Kamalul and MTB. Aldwich is wrong to contend that 'the plaintiffs' suit against MTB is on a separate and distinct cause of action from the plaintiffs *(sic)* suit against the first, second and third defendants'; and

D It would result in multiple proceedings on the same facts and issues being filed, possibly resulting in inconsistent findings and judgments of the courts which hear the suits. It is trite law that a multiplicity of proceedings is to be avoided.

[162] Further, I find there is merit in the plaintiffs' submission that the plaintiffs have a statutory right to recover their losses or damages against E Aldwich for breaches of ss 32B and/or 38 of the SC Act, which prohibits, inter alia, the issuer from making any false or misleading statements or material omissions in the proposal submitted to the SC pursuant to s 32 and in the IM.

Limited recourse against Aldwich

F

[163] Under this head of argument Aldwich argues that the plaintiffs cannot maintain a claim for RM177,248,747.31 and seeks to limit Aldwich's liability to RM21m, the amount recovered from the liquidation of Aldwich's assets. In this regard Aldwich relies on cl 13.1 of the trust deed which reads:

G The Bonds are limited recourse in nature in that the payment obligations of the Issuer under the Bonds are limited to the extent of the Secured Property. If the net proceeds of the realisation of the Secured Property are not sufficient to make all payments due in respect of the Bonds to be redeemed (including interest thereon, if any) any such shortfall shall be borne by the Bondholders according to the priority H specified in Clause 13.2 ....

[164] Essentially Aldwich's argument is two fold. First, Aldwich argues that when the SC approved the trust deed, 'it logically follow that each and every term of the trust deed has been approved [and] there does not have to be a I specific approval for clause 13.7'. With respect I hold this contention is misconceived because the trust deed was not required to be submitted to the SC for approval and there is no evidence that the trust deed was submitted to SC for approval. The trust deed was only executed on 22 May 2003, after the SC approved Aldwich's proposal on 4 April 2003 (B11/2292–2294). In fact

para 4(ii)(b) of that said letter specifically requires that a certified copy of the trust deed be submitted to SC before the bonds were issued. The trust deed was only lodged with SC on 12 August 2003 (the uncertified copy) and 19 September 2003 (the certified copy) (B11/2343), that is after the bonds were issued on 15 August 2003. I find SC took exception to Aldwich's non-compliance of SC's direction as is evident from the following paragraphs of the said letter:

> 3. *Kelewatan pihak tuan untuk mengemukakan dokumen tersebut merupakan suatu pelanggaran terhadap syarat-syarat kelulusan kami.*
>
> 4. Sehubungan dengan ini, pihak tuan diingatkan mengenai kepentingan untuk memastikan pematuhan sepenuhnya terhadap segala terma dan syarat kelulusan kami. *Pihak kami tidak akan teragak-agak untuk mengambil tindakan yang lebih keras, sekiranya perkara sedemikian berulang lagi di masa hadapan*. (Emphasis added.)

[165] The plaintiffs were only given copies of the bond contracts towards the end of 2009 after requesting the same from Mayban Trustees in a bondholders' meeting held on 21 October 2009 and only had knowledge of the terms and conditions therein since then. Given the approach adopted by SC, to my mind it is significant that the effect of the limitation clause (cl 13.1) was never disclosed in the proposal to SC or in the IM. In my judgment in failing to make such a material disclosure, Aldwich breached s 32B, and is liable to the plaintiffs under ss 57 and 153 of the SC Act and the effect of the material omission from the IM exposes Aldwich to breach of s 38 of the SC Act.

[166] Secondly, Aldwich argues the claim for loss and damage under s 153 of the SC Act is qualified with the words 'may recover' thereby indicating that the recovery for loss and damage is left to the free will of the prejudiced party and the bondholders had exercised their free will to restrict liability via cl 13.1 of the trust deed. In my judgment such a construction of cl 13.1 is untenable given that the limitation clause to limit Aldwich's liability under the SC Act is null and void pursuant to s 65 of the SC Act, which stipulates that 'an agreement [Clause 13.1] is void in so far as it purports to exclude *or restrict* the liability of a person for contravention of Section 55, *57* or 58 or for loss of damage under *Section 153*'.

WAIVER

[167] Aldwich sought to argue that because only six of the 15 breaches pleaded against Aldwich were relied onto call for the trigger event and EOD, the bondholders (including the plaintiffs) have waived the other nine breaches. Aldwich relies on the following passage from the judgment of Lord Diplock in the decision of the House of Lords in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871; [1971] AC 850 with emphasis on the 'second type of waiver [based] on the conduct [of the first, second and

A third defendants] in restricting the allegations of breach to 6 [on] which the event of default was called'. The relevant passage from the said judgment Aldwich relies on reads:

> The second type of waiver which debars a person from raising a particular defence to a claim against him, arises when he either agrees with the claimant not to raise
B that particular defence or so conducts himself as to be estopped from raising it.

[168] With respect in my view this argument is wrong in fact and in law for the following reasons:

C (a) a reading of the bondholders' special resolution declaring the EOD clearly suggests otherwise. It reads:

> *BREACH OF UNDERTAKINGS BY THE ISSUER: It has come to the knowledge of the Bondholders that the Issuer has breached its undertaking/covenants under the Transaction Document particularly*
D *clauses 9.1(c), 9.1(h), 9.1(x) and 9.1(y)(i) of the Trust Deed and Clause 5.2 of the Assignment and Charge*, the details of which are more particularly set out in Appendix A attached hereto. (Emphasis added.)

[169] Further, contrary to what was contended by Aldwich in para 77 of its
E submissions, not all of the nine breaches (other than the six relied upon to call for a trigger event and EOD) particularised by the plaintiffs in their case against Aldwich were known to the plaintiffs or already in existence when the plaintiffs were deliberating on whether to call for a trigger event or EOD. Those breaches which were not in existence or not known to the plaintiffs at the time of their
F calling were the:

(a) failure to ensure that the WOR plant was satisfactorily completed;

(b) failure to maintain an Actual DSCR of 1.5 times and a projected DSCR of 1.5 times at all times, which is why clarification from EY was sought;

G

(c) failure to continue operations of the WOR plant; and

(d) failure to redeem the bonds in the sum of RM242 million on 18th February 2010. This breach did not arise until an EOD was declared by the Bondholders.

H

[170] Tan Kah Yin (DW7), who gave evidence on behalf of Mayban Trustees, disagreed with counsel for Aldwich's suggestion that Mayban Trustees waived those breaches under cl 28.1 of the trust deed that were not set out in the special resolution (NP8/Day 31/p 113 line 33 to p 114 line 30).

I

[171] This was also confirmed by Andrew Leong (PW8) who stated during re-examination that the third plaintiff, CIMB did not receive any documents from Aldwich requesting for a waiver or acquiescence of its breaches, or any documents from Mayban Trustees stating that it had waived or acquiesced in

Aldwich's breaches (NP3/Day 13/p 9/lines 8–25). This is in line with the requirement under cl 28.1 of the trust deed that '... Subject as aforesaid any such authorization or waiver shall be notified by the Issuer to the Bondholders in accordance with the provisions of this Trust Deed and shall be binding upon the Bondholders'.

[172] I agree with the plaintiffs' submission that 14 of the 15 breaches (the 15th breach by Aldwich pleaded by the plaintiffs in their statement of claim was Aldwich's failure to repay the entire outstanding sum after the declaration of an EOD) were either trigger events or EOD. Thus, all these 14 breaches (none of which were ever remedied by Aldwich), would have in any event and in the circumstances of this case (namely the expiry of the 30 day 'Grace Period' in which Aldwich was required to remedy a trigger event) entitled the bondholders to:

(a) direct Mayban Trustees to declare an EOD; or

(b) declare a trigger event, both of which would require Aldwich to do the one act it failed to do: repay its bond obligations.

[173] I agree with the plaintiffs' submission that the correct legal position is stated by Justice Christopher Clarke in the decision of the Queen's Bench Division in *Dalkia Utilities Services plc v Celtech International Ltd* [2006] 1 Lloyd's Rep 599 at p 632 para [143] when he said, inter alia:

> ... Even if he refers to a particular clause upon which he relies, that would not inevitably mean that he was only relying on that clause. If that were so an innocent party who, in the fact of a repudiatory breach, terminated the contract by reference to a clause which was in fact inapplicable, might, on that account, find himself disentitled to terminate at all.

LIFTING THE CORPORATE VEIL

[174] The abovesaid defence of Aldwich, AEM and Kamalul on lifting the corporate veil have been discussed in paras 122–127 above.

Kamalul's counterclaim

Validity of the declaration of EOD

[175] Under this head of argument Kamalul raised the following issues:

(a) both the trigger event and EOD are mutually exclusive remedies under the trust deed: a trigger event allows Aldwich to redeem the full amount of the bonds within a period of two years and seven months whereas an EOD requires Aldwich to redeem the full amount immediately;

(b) by reason of the trigger event and EOD being mutually exclusive remedies, the plaintiffs were estopped from calling an EOD after they elected to declare a trigger event; and

(c) in consequence, the said declaration of EOD had caused the premature end of Aldwich's business, which in turn caused Kamalul to suffer loss in his capacity as a junior noteholder.

[176] The evidence revealed Aldwich admitted vide two letters (para 121 above) had acted in breach of the covenants in the bond contracts and would make payment of the EOD redemption value sum of RM242m. The admissions in those letters were again confirmed by Kamalul during cross-examination (para 119(d) above).

[177] Secondly, in my judgment notwithstanding that the Plaintiffs were not parties to the suit, the doctrine of res judicata would apply to them as 'privies' of Mayban Trustees. This is supported by *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. Hence the validity of the EOD can no longer be relitigated by Kamalul in these proceedings as it has been determined by Anantham J and upheld by the majority of the Court of Appeal in the earlier Kamalul Suit. Hence even though the plaintiffs were not parties to the earlier Kamalul Suit, Anantham J (as he then was) considered the same issues raised the same arguments ventilated by Kamalul in his written submission herein in paras 31–32 respectively which is reproduced to appreciate the full purport of the judgment:

> 31. *Counsel for the Plaintiff [Kamalul] submitted that the Plaintiff's prospect of retiring the notes by the final maturity date stipulated in the letter of Declaration of the Trigger Event was instead thwarted by the notice of non compliance issued by MTB to the Plaintiff on 18 January 2010, pursuant to clause 11.1(c) of the SBTD*. This notice of non compliance which Counsel for the Plaintiff referred to as the Enforcement Notice in his written submission effectively provided the Plaintiff with 30 days to remedy the non compliance. In default of such compliance, the bondholders were entitled to declare an Event of Default and consequently accelerate the due payment of the outstanding sum. According to Counsel for the Plaintiff, MTB had every opportunity of preventing the Event of Default from being declared in respect of the breaches on the part of the Plaintiff by exercising its powers under clause 28 of the SBTD to waive all or any of the said purported breaches even before the Bondholders could pass any resolutions to declare an Event of Default. In the event, the Bondholders declared an Event of Default on 18th February 2010.
>
> 32. With respect, *I find no merit in this complaint because it is evident from clause 5.5 set out earlier, that the Plaintiff's entitlement to pay the outstanding sum by the legal maturity date of 15th August 2012 was conditional on the Bondholders inter alia not declaring an Event of Default under the SBTD. The fact of the matter is that the Bondholders did declare an Event of Default. Secondly, the grounds for the declaration of*

the Trigger Event was (sic) the Plaintiff's failure to make payments into the Debt Service Reserve and Disbursement Account in accordance with the terms of the Trust Deed. It is not in dispute that the Plaintiff was in default of making such payments. In my judgment, the Plaintiff cannot on the one hand admit to being in breach of clause 10.1(c) of the SBTD and simultaneously contend that the Bondholders cannot pass the resolution declaring an Event of Default ... (Emphasis added.)

[178] Based on cl 11.1(c) of the trust deed, counsel for Kamalul argues that only remediable breaches can be relied upon as grounds for calling an EOD. Clause 11.1(c) provides:

If any of the following events shall occur, that is to say:

(c) *the Issuer or AEM fails to perform or observe any other undertaking, obligation or agreement in the Bonds or any Transaction Document* to which it is either subject or a party (other than as stated in Clause 11.1 (a) above or a failure falling within Clauses 10.1(a), (b), (c), (d) or (e) above) *and if that failure is remediable and the Issuer or AEM has not remedied the failure to the reasonable satisfaction of the Bondholders* as confirmed by a Special Resolution *within thirty (30) days after becoming aware or being notified of the failure*;

...

then the Trustee may, and if so directed by a Special Resolution of the Bondholders shall (subject to its right under these presents to be indemnified), declare (by giving notice thereof to the Issuer) that all sums payable under the Bonds are immediately due and payable at the Event of Default Redemption Value ... (Emphasis added.)

[179] In my judgment given the phrase 'and if', I am of the view that a plain reading of cl 11.1(c) can be construed to mean an EOD can be called for any breaches (save for those that are specifically excluded), whether they are remediable or not. In addition, in relation to breaches that are remediable, before an EOD can be called, Aldwich must give 30 days to remedy the breach.

[180] In any event, I am of the view all the alleged breaches complained of by Aldwich can be remedied as follows:

(a) Aldwich's failure to pay its monthly DSRA payments into the DSRA was remediable by Aldwich, simply by making the outstanding payments;

(b) Aldwich contends that its annual audit for 2009 could not be completed because Maybank delayed in reverting with some audit debt confirmations, causing EY to be unable to complete that audit. This is remediable as all Aldwich would have to do would be to wait for Maybank to revert with the outstanding audit debt confirmations. Alternatively, EY could have issued a qualified audit opinion on Aldwich's 2009 financial statements;

(c) Aldwich contends that AEM's failure to procure the acknowledgements of the assignment of AEM's contracts is not remediable. Aldwich itself states that the supplemental BSAs were entered into because some of AEM's counterparties refused to agree to such assignment. Little, if any follow-up action was ever taken by Aldwich;

(d) the alleged failure to provide company particulars could easily be remedied by Aldwich providing the same; and

(e) EY's failure to provide a clarification on the computation of actual DSCR for 2009. EY refused to provide a clarification upon request by Mayban Trustee because EY required Aldwich's instructions, as Aldwich was its client. This breach was remediable by Aldwich. No documentary evidence has been produced by Aldwich of a request made by it to EY to clarify EY's computation of the 2009 actual DSCR to the bondholders (see para 184 below).

[181] Furthermore I find Aldwich: (i) never wrote to MTB between 18 January 2010 (date of notice of breach) and 18 February 2010 (declaration of EOD) to assert that those breaches were not remediable; (ii) failed to provide any documentary evidence of the attempts taken to remedy the breaches. It is settled law that a party cannot benefit from its own breach.

[182] Counsel for Aldwich in cross-examination (of Andrew Leong) seems to give the impression that the bondholders want their pound of flesh. I find factually such was not the case: Mayban Trustees in its notice of breach to Aldwich dated 18 January 2010 listed out six breaches that were committed by Aldwich as at that date. All of those breaches occurred on a much earlier date, but Mayban Trustees had extended the time for Aldwich to comply with those contractual obligations. As at 13 January 2010 (which is a day after the trigger event was declared), those obligations were not performed. By Mayban Trustees' letter to Aldwich dated 18 January 2010 (after the trigger event on 12 January 2010), Mayban Trustee demanded that Aldwich remedy those breaches. These EODs however were again not remedied by Aldwich as at 17 February 2010. It was only then that the bondholders duly called for an EOD on 18 February 2010 pursuant to cl 11.1(c) of the trust deed.

[183] Counsel for first, second and third defendants submit that pursuant to cl 11.2 of the trust deed, the bondholders could only declare an EOD after declaring a trigger event, if the events of default occurred subsequent to the declaration of the trigger event. Clause 11.2 stipulates as follows:

> *Notwithstanding the declaration of a Trigger Event*, the Trustee may, and if so directed by a Special Resolution of the Bondholders, *shall declare an Event of Default (by giving notice thereof to the Issuer) if, subsequent to the declaration of such Trigger Event, an Event of Default has occurred* and that *all outstanding Bonds shall, notwithstanding*

> *such declaration of a Trigger Event, be immediately due and repayable* at the Event of Default Redemption Value. (Emphasis added.)

Based on the declaration of the trigger event (12 January 2010), the letter from Mayban Trustees setting out the non-compliances (18 January 2010), it is observed that all the breaches complained alluded to in para 108 above occurred after the declaration of the trigger event either because the bondholders had granted extensions of time for Aldwich to comply with those obligations, or because the requests for the documents/information themselves occurred after 12 January 2010. When Aldwich failed to comply with their obligations by the extended dealings, Mayban Trustee then issued the letter of 18 January 2010 to inform Aldwich that they were in non-compliance. When Aldwich failed to remedy these non-compliances within 30 days, Mayban Trustee declared an event of default on 18 February 2010. In my judgment the bondholders calling for the EOD is in conformity with the requirements under the trust deed.

[184] With regard to item 6 in Mayban Trustees' letter of 18 January 2010, where the bondholders asked EY to explain their DSCR calculations, counsel for first, second and third defendants submit that it is out of Aldwich's hands if EY refuses to do so. With respect the said contention cannot be sustained. The reason being cl 9.1(c) of the trust deed which Aldwich is in breach of stipulates that the failure of the auditors to furnish any information shall be deemed to be Aldwich's failure.

Tort of procurement of breach of contract

[185] Kamalul pleaded in para 49A of his amended counterclaim that:

> The 3rd Defendant [Kamalul] avers that the Bondholders inclusive of the Plaintiffs deliberately caused the 5th Defendant [MTB] to breach the 3rd Defendant's [Kamalul] contract with the 4th [Aseam] and 5th Defendants [MTB] (namely the Security Agency Agreement and the Junior Notes Trust Deed respectively) and thereby procured the breach of the said agreement knowingly and/or recklessly, indifferent whether it is a breach of not.

[186] I agree with the plaintiffs' submission that the basis of Kamalul's counterclaim is erroneous as Kamalul was not a party to the SAA and the junior notes trust deed. The only relevant parties to those agreements were Aldwich and AEM. Therefore Kamalul is not the proper party to institute the claim for tort for procurement of breach of contract against the plaintiffs.

[187] Further Kamalul has neither pleaded nor proved what obligations were owed to him by the plaintiffs. In any event, I find the plaintiffs have demonstrated that it was entitled to call the EOD and did so in strict

compliance with the terms of the bond contracts, and in particular cl 11 of the trust deed. Hence I find the declaration of the EOD was valid and not premature.

[188] Kamalul submits that the bondholders' act in calling for an EOD amounts to a procurement of the breach of the trust deed by Mayban Trustees. In *Emerald Construction Co Ltd v Lowthian and Others* [1966] 1 All ER 1013 (cited by Kamalul) at p 1017F the English Court of Appeal held 'For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is breach or not'. On the strength of this case, I agree with the plaintiffs' submission that Kamalul's contention is wrong in law bearing in mind that the trust deed was entered into for the benefit of the bondholders.

[189] Kamalul contends that as a result of the calling of an EOD, he suffered loss arising from the non-redemption of the junior notes. I find there is no merit in this contention because the junior notes held by Kamalul were always subordinated to the senior bonds, as is evident from cl 3.4 of the junior notes trust deed. I agree with the plaintiffs' submission that in the circumstances when the bondholders are not able to fully recoup their losses, Kamalul cannot be in a better position under the trust deed to recover whatever losses allegedly suffered as a result of the non-redemption of the junior notes.

The WOR plant

[190] Aldwich and AEM contends that the WOR plant was satisfactorily completed thereby justifying the release of RM59m bond proceeds in the Escrow Account to AEM. In support of this contention, they rely on the following factors:

(a) Kamalul gave evidence that the WOR plant was completed satisfactorily in 2005 and was being utilised at its intended capacity and was in fact in proper and continuous operation before the release of the RM59,449,961 to AEM;

(b) the RAM report dated July 2006, also confirms that the WOR plant commenced operations in January 2005; and

(c) Saraswathy also confirmed that all the requirements had been met before the release of the monies to AEM, in respect of the WOR plant.

[191] In addition Aldwich and AEM hinge on the fact that Aseam and RAM itself had confirmed that the prerequisites to the release of the funds to AEM have been met proves that the plaintiffs' allegation that the WOR plaint was not completed satisfactorily so as to commence proper and continuous operations is untenable.

[192] As to whether Aseam has satisfied the conditions precedent that have to be satisfied prior to the release of the RM59m in respect of the WOR plant will be discussed when I consider this complaint of the bondholders against Aseam later.

The plaintiffs' claim against Mayban Trustees

[193] It is important to appreciate the nature of the trust deed as it has bearing. Clauses 7.2 and 7.3 of the trust expresses the declaration of trust between Aldwich and Maybank Trustees. Clause 21 sets out the extensive rights and powers of the trustee as follows:

> *21. TRUSTEE'S RIGHTS AND POWERS*
>
> 21.1 *The Trustee has the rights and powers set out in this Clause 21 in addition to those it has under the Trustee Act, 1949 (Act 208) of Malaysia and at general law …*
>
> 21.9 *The Trustee shall at all times exercise reasonable diligence to ascertain*, based on the accounts, reports, certificates, circulars, opinions or all other documents forwarded to the Trustee, *whether the Issuer has committed any breach of the terms and conditions of the Bonds or provisions of this Trust Deed or whether a Trigger Event or an Event of Default has occurred and is continuing, the Trustee shall exercise such rights and powers vested in it by this Trust Deed and use reasonable skill and diligence in exercising such right and powers*. (Emphasis added.)

[194] Clauses 21.2 and 21.3 enable Mayban Trustees to appoint an agent or professional adviser to discharge its obligations.

[195] The contractual liability of Mayban Trustees is found in the following clauses:

> … Except in the case of a Trustee Default, the Trustee is not responsible for any loss, costs, damages, expenses or inconvenience that may result from the exercise or non-exercise of those trusts, powers, authorities and discretions.
>
> 21.17 Nothing in this Trust Deed or the Bonds should be construed as relieving, exempting or indemnifying the Trustee form liability for:
>
> (i) a Trustee Default; or
>
> (ii) failure to show reasonable degree of care and diligence required of it as a trustee …

[196] Contrary to counsel for Mayban Trustees and Aseam's submission that 'the critical period in this case is just before August 2009 [when Aldwich first failed to remit the DSRA build up payment] to January 2010 [when the Trigger Event was declared]', I am of the opinion the duties imposed upon Mayban Trustees began prior to the issuance of the Aldwich bonds on 15 August 2003. Under s 82(1) of the SC Act, Mayban Trustees:

A (b) shall satisfy itself that the provision of a prospectus relating to the debenture do not contain any matter which is inconsistent with the terms, provisions and covenants of the debenture and the trust deed.

The terms 'debenture' is widely defined to include 'bonds' and 'securities' means 'debentures' (s 2(1) of the SC Act). In other words, Mayban Trustees was obliged to review the IM, (which is a 'prospectus' within the meaning of s 82), and satisfy itself that it is not inconsistent with the trust deed.

[197] In addition Mayban Trustees has the following duties under s 82(1):

C (a) *shall exercise reasonable diligence to ascertain whether the assets of the borrower* and of each guarantor *which are or may be available*, whether by way of security or otherwise, *are insufficient or are likely to become insufficient to repay the amount secured or payable under the debenture to which the trust deed relates as and when it becomes due*.

D (k) *shall apply to the Commission of a direction under subsection 89(1) where the trustee upon due inquiry is of the opinion that the assets of the inquiry is of the opinion that the assets of the borrower and the guarantor which are or should be available, whether by way of security or otherwise, are insufficient or are likely to become insufficient to repay to amount secured or payable under the debenture to which the trust deed relates when it becomes due.*

E (l) *shall apply to the Court for an order under section 91 where*:

(i) *the trustee upon due inquiry is of the opinion that the assets of the borrower and the guarantor which are or should be available*, whether by way of security or otherwise, *are insufficient or are likely to become insufficient to repay the amount secured or payable under the debenture to which the trust deed relates when it becomes due*; or

F (ii) the borrower has failed to comply with a direction made by the Commission under subsection 89(1). (Emphasis added.)

G **[198]** Further under s 82(1)(c), Mayban Trustees' obligation is to ensure that Aldwich does not commit any breaches:

(c) [Mayban Trustees] shall exercise reasonable diligence to ascertain whether the borrower or each guarantor has committed any breach of the terms, provisions or H covenants of the debenture or the trust deed or has contravened any of the provisions of this Act ....

[199] Mayban Trustees has the duty to ensure that Aldwich remedies any breaches that Aldwich may have committed, which, inter alia, include:

I (d) *shall do everything in its power to ensure that the borrower* or each guarantor *remedies any breach known to the trustee of the terms, provisions or covenants of the debenture or the trust deed or any contravention of the provisions of this Act* unless the trustees is satisfied that the breach or contravention will not materially prejudice the debenture holder's interest or any security.

(See also (sub-s (e), calling of bondholders meeting as detailed in s 87, (g), (m) of s 82(1)), s 91, power of court to give directions upon trustees' application, including specific powers under s 91(1)).

[200] Kamalul testified that Mayban Trustees was appointed on the recommendation of Aseam and 'it was an advantage to have all the players from the Malayan Banking Group, [AEM's banker at that time]'. Tan Kah Yin (DW7), the sole witness called by Mayban Trustees was employed in November 2008; hence she had no personal knowledge of the circumstances surrounding Mayban Trustees in any appointment as the trustee, the drafting of the trust deed and how Mayban Trustees discharged its functions for five years; her knowledge being gathered principally from her reading of the files maintained by Mayban Trustees. Tan Kah Yin's evidence reveals that Mayban Trustees was aware of its duties under the trust deed: cll 21.9, 9 (positive and negative covenants by Aldwich to comply with all the bond contracts which Mayban Trustees have to make sure that they comply); cl 9.2, duty with regards to the annual budget and annual projected cash flow statement); and Tan Kah Yin agreed this is confirmed by the Mayban Trustees' letter dated 5 December 2008 to Aldwich reminding Aldwich 'In the meantime, would appreciate if you could adhere and made reference to all the covenants stipulated under the abovementioned Trust Deed as part of compliance requirements'.

(NP8/Day 31/p 39 line 1 to p 40 line 16), (NP8/Day 31/pp 43 line 34 to p 44 line 16), (NP8/Day 31/pp 49 lines 16–33).

[201] It is pertinent to note because of the intrinsic nature of the bond industry where the bondholders became involved just before the issuance of the bonds and they belong to a fluctuating class thereafter, they never sign any contracts. Herein Mayban Trustees signed the trust deed on the bondholders behalf: Tan Kah Yin testified that Aldwich (issuer) gives the undertaking in respect of the positive and negative covenants to Mayban Trustees (trustee) because she accepts that if there is non-compliance of the same, Mayban Trustee monitors and polices Aldwich's conduct.

[202] As neatly summarised by the plaintiffs, the bondholders have two principal complaints against Mayban Trustees: (i) the bondholders contend that Mayban Trustees failed to ensure that the IM did not contain any matter which was inconsistent with the terms, provisions and covenants of the trust deed and other bond contracts; and (ii) in breach of its duties under s 82 of the SC Act, Mayban Trustees failed to exercise reasonable diligence to ascertain that Aldwich had failed to:

(a) deliver the acknowledgments endorsed on the notices of assignment and letters of novation to Aseam, in breach of cl 5.2 of the assignment and charge;

(b) assign the HSBC metals account to Aseam, contrary to cl 3.1 of the assignment and charge;

(c) credit all its cashflow proceeds into the revenue account as stipulated in cl 7(b)(i) of the assignment and charge and cl 9.1(dd) of the trust deed, and instead:

(i) credited its cashflow proceeds and other revenue into the disbursement account and/or such other accounts not controlled by Aseam; and

(ii) deducted the costs of the catalysts in respect of its catalyst recovery business prior to remitting the nett proceeds from the sales of such catalysts, which only amounted to 15% of the actual proceeds, into the disbursement account; and

(d) comply with the 'ring-fencing' structure stipulated in the priority of payments and application of proceeds, and instead caused monies to be paid out from the designated accounts contrary to the manner set out in the trust deed and assignment and charge (in Appendix D), in breach of cl 9.1(ww) of the trust deed.

[203] At the outset I wish to state that counsel for Mayban Trustees and Aseam, Mr Robert Lazar submits that the findings of *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169 ('*Pesaka* (FC) judgment') apply in this present case on the 'Important Notice point' (paras 40 and 44) and the finding by the Federal Court there is no duty of care owed by the lead arranger at paras 46–48 of the *Pesaka* (FC) judgment) is binding on this court on principle of stare decisis (the application of *Pesaka* (FC) judgment vis a vis Aseam will be discussed later). I am incline to agree with the submission of counsel for the paintiffs, Mr Tommy Thomas that 'every level was vindicated to some extent on some issues. So therefore, there are parts of the grounds of judgment of each of the courts which are still good despite Federal Court decision'.

[204] It cannot be gainsaid that the bond market is a highly regulated industry where:

> [W]hole divisions and part of the Securities Commission Act 1993 (Act 498) are dedicated to prescribing on the matters that are requisite in this industry. It regulates the type of documents that must be made available, the persons or the entities who are allowed to partake or to be involved in its issue. As well as to prescribe the respective duties and obligations of these parties. It's a licensed industry such that any breaches may render certain persons liable to criminal proceedings and special provisions as well as rights have also been prescribed to entitle right of action to be taken against the persons involved. That right may be engaged even without any criminal proceedings being undertaken.

...

To meet the demand of borrowers [Aldwich] who are looking to using bonds as a form of financing, there has evolved a team of professional promoters, advisers and trustees such as [Mayban Trustees] and [Aseam] in this case.

(Per Mary Lim J (now JCA) in *MIDF Amanah Investment Bank Bhd v Pesaka Astana (M) Sdn Bhd* Suit No D5(D6)-22–1810 of 2005 ('*Pesaka* (HC) judgment').)

[205] The evidence showed the conduct of Mayban Trustees was wanting, lacking 'the professionalism, competence, skill expected of professional trustees' (per Jeffery Tan JCA in *Mayban Trustees Bhd v CIMB Bank Bhd and other appeals* [2012] 6 MLJ 354 ('*Pesaka* (CA) judgment') at p 371 para [27] and Mayban Trustees ought to be more vigilant and 'To use the words of the learned judge, (Mary J in *Pesaka* (HC) judgment), MTB instead of being proactive, had behaved 'like a mannequin' when its appointment as trustees went as far back as July 2003' (per Arifin Zakaria CJ in *Pesaka* (FC) judgment at p 221 para [149]). I rely on the following evidence gleaned from the cross-examination of Tan Kah Yin as summarised by the plaintiffs:

(a) Mayban Trustees was unaware of its obligations when it received letters from EY (through Aseam) pertaining to the DSCR and annual budget (D17/427 and D17/431) as can be observed from Tan Kah Yin's response:

TMT	Ok. Do you know what Mayban Trustees' obligation is when they get this letter or letters like this?
TAN	I do not know.

(b) Mayban Trustees failed to carry out any investigations and was content to simply rely on the other bond players to supply it with information, which resulted in its failure to ensure that Aldwich had returned the acknowledgments of the notices of assignment and letters of novation;

(c) Mayban Trustees was unaware of the supplemental BSAs until sometime in July 2009 and Mayban Trustees did not have any copy of the same for six years (from August 2003) till July 2009;

(d) Mayban Trustees assumed that Aldwich acted in compliance of the trust deed and other bond contracts prior to the issuance of the bonds, which resulted in its failure to take any necessary measures to ensure compliance of the bond contracts and the provisions of the SC Act by the issuer, in breach of Mayban Trustees' obligations under s 82 (NP8/Day 31/p 101 line 26 to p 102 line 5);

(e) Mayban Trustees accepted Aldwich's representations at face value as to 'Aldwich credited all its cash flow proceeds into revenue account' and

A Aldwich's ring-fencing and the priority of payments without probing into their accuracy (NP8/Day 31/p 102 lines 11–25); and

(f) Mayban Trustees never contacted EY for any information pertaining to the Aldwich bonds.

B

[206] Upon becoming aware of Aldwich's breaches, Mayban Trustees was also under a duty to notify SC of the same and Tan Kah Yin testified Mayban Trustees was aware of the said duty when queried regarding the reproduction of s 273(1)(d) of the Capital Markets and Services Act 2007 ('the CMSA') (formerly s 82 of the SC Act) in its letter to SC dated 5 November 2009 (D2/720–721) and carbon copied to Aldwich and Aseam.

C

[207] Despite Aldwich's admission that it had breached various terms of the trust deed since 2004 (non-crediting of revenue into the revenue account) and since August 2009 (failed to make DSRA payment), Mayban Trustees only notified SC of Aldwich's breaches in November 2009 and the only complaint in the letter of 5 November 2009 was Aldwich's failure to make monthly DSRA payment since August 2009.

D

E **[208]** Mayban Trustees failed to comply with s 82(k) and (l) of the SC Act by seeking directions from the SC or applying to court for an order under s 91 as confirmed by Tan Kah Yin (NP8/Day 31/p 100 lines 2–32).

Mayban Trustees' role is administrative and ministerial

F

[209] Under this head of argument Mayban Trustees submits its duty as a trustee is administrative and ministerial relying on the *earlier Kamalul Suit* at 54–541 para [56] that '[I]t was rightly held by the Court of Appeal that the duty of a Trustee is administrative and ministerial'. With respect this statement

G is the dissenting judgment of Abdul Wahab Patail JCA (as he then was) who adopted the said position following the English cases of *Elektrim SA v Vivendi Holdings 1 Corp; Law Debenture Trust Corp plc v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178 and *Citibank NA v Law Debenture Trust* [2008] 1 BCLC 376.

H

[210] To the contrary, it is my respectful view that the duties of a professional trust corporation offering the services for a fee (as in the case of Mayban Trustees) as enunciated by Brightman J at pp 152c–153b, amongst others, is instructive:

I

> ... So far, I have applied the test of the ordinary prudent man of business ... I am of opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specified business of trust management. A trust corporation holds itself out in its advertising literature as being above ordinary mortals. With a specialist staff of trained trust officers and managers, with ready

access to financial information and professional advice, dealing with and solving trust problems day after day, the trust corporation holds itself out, and rightly, as capable of providing an expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of a trusteeship ... a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it profess to have.

[211] I have alluded earlier to Kamalul's evidence as to what motivated him in appointing Mayban Trustees was the fact that the latter was a member of the Maybank Group of Companies which allowed for the efficient issue of the bonds programme. Similarly, having perused the evidence of the fund managers, Philomena Jan (PW1), Goh Wee Peng (PW7), Andrew Leong (PW8) and Abdul Razak (PW3), I find the key consideration for all these fund managers when purchasing the Aldwich bonds is the importance placed by the bondholders on the identity of the lead arranger and trustee did not feature in their credit analysis papers does not negate in part or all the evidence of such reliance. To illustrate the point, it can be seen that Abdul Razak stood firm despite rigorous cross-examination on the credit analysis papers of RHB Nominees Sdn Bhd (the fourth plaintiff) (D20/1–5):

RL And the reason you're saying that that is important is it because they are part of a financial group?

RZK Yes, plus of course of their reputation of involving in other transactions.

...

RZK Agreed. But like I said, because this issuance is arranged by Aseambankers, so you know, by appointing, having Mayban Trustee actually give confident, because they are in the same group.

...

RZK We already mention the principal adviser and lead arranger is Aseambankers Malaysia Bhd and the trustee is Mayban Trustees Bhd.

...

RZK So, here already mentioned, that's why it's mentioned up-front already that the trustee is Mayban Trustees Bhd.

RZK Yes, because it is already set out in the front page.

(NOP1/Day 4/pp 119–124/lines 23–36.)

[212] In any event I find the fact that Mayban Trustees has to play a proactive role as trustee of the Aldwich bond programme has been laid to rest by the

Federal Court in *Pesaka* (FC) judgment alluded to in paras 203–208 above.

THE PLAINTIFFS' CLAIM AGAINST ASEAM

[213] The primary roles played by Aseam is that of adviser and lead arranger during pre-bond stage and as facility agent and security agent during post-bond stage. Saraswathy's evidence given in cross-examination indicate what these roles in essence entail:

> SARAS *As advisor*, Aseam would be involved with the issuer to structure the bonds and to discuss with the issuer on the terms and conditions of the bonds as well are.
>
> ...
>
> SARAS *As lead arranger*, Aseam would also be involved in ensuring that the bonds [because we lead arranged the program itself] [are] subsequently issued are also distributed.
>
> ...
>
> SARAS [As] *Facility agent* is more administrative where the facility agent will then facilitate the issuance of the respective stocks with basically ascribing the *stock codes* and the operations of the bond issuance to including to collect the, to advise on the payment amounts.
>
> SARAS [Explanation on *stock codes*] When bonds are issued, in this case, the serial bonds of RM293 million senior secured serial bonds, there will be respective series. So, each series has a different maturity. So, when we issued it in the system for series 1, for example, there will be a, let's say one year maturity in this case. Then there will be a different code allocated for that in the system in Bank Negara because everything is automated via the FAST System. So, that would be the facility agent's role to actually facilitate the issuance of the respective bonds.
>
> ...
>
> SARAS [As] *Security agent* will take care of the security that is allotted to the bond terms. Basically, the security agent's role would be to actually facilitate the controls of the accounts, the security documents will be charged to the security agent. So, the security agent's role would then be to hold all the securities that are stated in the PDS. (Emphasis added.)

(NP6/Day 27/p 13 line 11 to p 14 lines 5–35.)

[214] Two relevant contracts both dated 22 May 2003 wherein Aseam is featured as the security agent are: (i) the security agency agreement (D12/420–550); and (ii) the assignment and charge agreement by Aldwich

(D12/569–598). In the case of the former contract, the other parties are Aldwich, AEM and Mayban Trustees whilst in the case of the latter contract, the other party is Aldwich.

[215] Clause 2.2 of the security agreement provides:

> *Trust*
>
> *The Security Agent shall hold its rights and interests in and to the Charged Assets on trust for all the Secured Parties* in accordance with the provisions of this Agreement and the Security Documents provided always that *in relation to the Bonds Security Documents the Security Agent shall do so on trust for solely the Bonds Trustee and the Bondholders*. (Emphasis added.)
>
> *Clause 10.5 Responsibility for contents of Security Documents*
>
> *The Security Agent has no responsibility for the form or contents of this Agreement or any Security Document* and will have no liability arising as a result of or in connection with any inadequacy, invalidility or unenforceability of any provision of this Agreement or the Security Document *(except where such inadequacy, invalidity or unenfoceability is in respect of itself and is caused by an act, omission, gross negligence or misrepresentation of the Security Agent itself)*. (Emphasis added.)

[216] The relevant provisions in respect of the assignment and charge agreement by Aldwich are reproduced:

> Clauses 3.2 *Charge*
>
> *The Issuer as beneficial owner hereby charges the Designated Accounts, all monies from time to time standing to the credit of the Designated Accounts, the Cashflow Proceeds and the Permitted Investments in favour of the Security Agent as security for the payment in full of the Bonds Secured Amounts ...* Save for the charge over the Disbursement Account which shall be by way of a floating charge, the charge over the other assets charged under this clause 3.2 shall be by way of a fixed charge. Subject to clause 3.1, the Issuer's rights in relation to the charged assets under this clause 3.2 shall not be capable of assignment and the Issuer shall not encumber or create any rights over or in relation thereto.
>
> *3.3 Conversion of floating charge into fixed charge The floating charge created over the Disbursement Account shall immediately become converted into a fixed charge upon the declaration of a Trigger Event* in accordance with the Bonds Trust Deed *or the occurrence of an Event of Default* (whichever is the earlier) ...
>
> *4.1 Declaration of trust*
>
> *The Security Agent hereby declares itself to be Security Agent of the security hereby created for the Secured Parties.*
>
> 5.1 *The Issuer shall, immediately after the execution of this Assignment give to:*
>
> (a) *the Project Document Parties notices of assignment* in or substantially in the forms set out in Appendix F (with such amendments thereto as the Security Agent may agree);
>
> *... and shall cause the said parties to sign and deliver to the Security Agent the*

A *respective acknowledgements* endorsed on the copies of such notices.

5.2 *The Issuer shall*

(a) *immediately after execution of this Assignment and Charge;* and

B (b) *on the date on which the Issuer has subsequent to the execution of this Assignment and Charge entered into or received any Business Contract,* Insurance or Performance Bond for which no previous notice of assignment has been given in relation to this Assignment and Charge;

C *give to the Project Agreement Parties, the Insurers and the Issuing Bank(s) notices of assignment* in or substantially in the forms set out in Appendices F, H and I (with such amendments thereto as the Security Agent may agree), respectively, *and shall cause the said parties to sign and deliver to the Security Agent the respective acknowledgements* endorsed on the copies of such notices. *Such notices shall not be revoked or amended without the prior written consent of the Security Agent.*

D *7. UNDERTAKINGS*

The Issuer hereby undertakes and covenants to the Security Agent that:

(b) *it will forthwith pay or cause to be paid:*

E (i) *from time to time, all Cashflow Proceeds* (other than the proceeds from the issue of the Bonds and the Notes) *into the Revenue Account,*

...

F (B) *on a monthly basis, all payments of an amount equal to one-twelfth (1/12) of the total amount payable by the Issuer to meet the redemption of the Bonds* on the next forthcoming Expected Maturity Date *from the Revenue Account into the Debt Service Reserve Account,*

...

G and *it will not be entitled to, and will not, withdraw any monies from the Designated Accounts without the prior written consent of the Security Agent* save and except (i) in accordance with Appendix D and (ii) provided that no Trigger Event or Event of Default has occurred and is subsisting, for Permitted Investment;

...

H (d) it will deliver to the Security Agent a complete list of the persons (and specimens of their signatures) authorised by the Issuer to operate and sign cheques and notices of withdrawal and otherwise give instructions in relation to, the Designated Accounts (the 'Authorised Signatories') and will promptly notify the Security Agent of any additions to or deletions from such list PROVIDED ALWAYS THAT *the mandates for the Designated Accounts other than the Disbursement Account shall be such that the Security Agent shall be the sole signatory in relation to such accounts and the mandate for the Disbursement Account shall be such that the Security Agent shall be the sole signatory in relation to such account upon the declaration of a Trigger Event* in accordance with the Bonds Trust Deed *or the occurrence of an Event of Default* and the Security Agent shall be entitled to appoint any number of representatives as Authorised Signatories for the operation of such accounts;

I

(e) *it will promptly notify the Security Agent of all Business Contracts, Insurances and Performance Bonds it has entered into and received subsequent to the execution of this Assignment and Charge;*

...

Revenue Account

(1) Payment of taxes and other charges imposed by the Government of Malaysia.

(2) *Advanced financial quarterly payments of amounts equivalent to the aggregate of operational and administrative overheads, capital expenditure, professional fees and expenses* related to the issuance of the Bonds *required for:- (a) the next financial quarter based on the Annual Budget to the Disbursement Account; and (b) the maintenance of a minimum balance equal to two (2) months of the estimated annual budgeted operational expenses.*

(3) *Advanced monthly payments of an amount equal to one-twelfth (1/12) of the total amount payable by the Issuer to meet the redemption of the Bonds* on the next forthcoming Expected Maturity Date *to the Debt Service Reserve Account*. (Emphasis added.)

[217] As lead arranger and primary subscriber, Aseam entered into a subscription agreement dated 22 May 2003 (D15/90–120). Some relevant provisions are reproduced:

2.1 *Representations, warranties and undertakings*

As a condition to the agreement by the Primary Subscriber to subscribe for the Bonds, *the Issuer hereby represents and warrants to and undertakes with the Primary Subscriber and the Lead Arranger* as follows:

(i) *that, other than as set out in the Information Memorandum, since the date of the Information Memorandum, neither the Issuer nor AEM has entered into any contract or commitment of an unusual or onerous nature, which in the context of the issue of the Bonds, would be material for disclosure* and each of the Issuer and AEM has carried on its business in the ordinary and usual course;

...

(r) *that*, after having made all due and careful enquiries, *(i) the Information Memorandum contains all information with respect to the Issuer and AEM which is material in the context of the purposes for which the Information Memorandum is issued, (ii) the information and data contained in the Information Memorandum are true, accurate and not misleading, and (iii) there is no material omission in the Information Memorandum;*

4. Annual budget

The Issuer shall deliver an annual budget together with an annual projected cash flow statement ... duly endorsed by the Auditors to the Lead Arranger, not later than fourteen (14) days prior to the Issue Date or such other time frame as may be agreed by the Lead Arranger. Such annual budget shall relate to the matters set out in clause

A 9.2 of the Trust Deed (save for the calculation of the Debt Service Cover Ratio).

4.1 *The Primary Subscriber represents and warrants to and undertakes with the Issuer and Lead Arranger that:*

(h) *it will not make any representation to any prospective acquirer of the Bonds in respect of the Bonds and the Issuer that is inconsistent in any way with the contents of the Information Memorandum.*

4.2 Commitment of the Primary Subscriber

The Primary Subscriber relying upon the accuracy of each of the representations and warranties and undertakings set out in Clause 2.1 hereby *agrees covenants and undertakes with the Issuer that*, subject to the fulfilment of the conditions precedent set out in Clause 5.1 or waiver in respect thereof by the Primary Subscriber pursuant to Clause 5.1 (as the case may be) and provided that no Trigger Event or an Event of Default, has occurred or is subsisting, *it will on the Issue Date subscribe for all the Bonds at the Subscription Price upon the terms and conditions contained herein and it will pay the Subscription Price at the time stated in Clause 6.1 in immediately available and freely transferable funds to the Lead Arranger's Cash Account.*

5.1 Conditions Precedent

Subject to the terms of this Agreement and in particular to Clause 5.2, *the obligation of the Primary Subscriber to subscribe for the Bonds in their entirety pursuant to Clause 4.2 is subject to receipt by the Lead Arranger of the documents and evidences set out in Schedule 1 prior to receipt by the Lead Arranger of the Issue Request.*

5.2 Waiver

The conditions precedent set out in Schedule 1 are inserted for the benefit of the Primary Subscriber and may be waived by the Primary Subscriber in whole or in part with or without terms or conditions without prejudicing the Primary Subscriber's rights under this Agreement.

7. The Bonds shall be issued upon the terms and subject to the conditions of the Trust Deed, and the Primary Subscriber hereby declares that it has inspected the Trust Deed and is fully aware of and *agrees to be bound by the terms and conditions thereto*.

SCHEDULE 1

CONDITIONS PRECEDENT

3. The *Business Sale Agreements have become unconditional* or, to the extent that the conditions precedent therein must be met prior to the Issue Date, such conditions precedent have been fulfilled under the terms therein contained.

4. *All licenses and corporate/regulatory approvals in respect of the transfer of the businesses under Business Sale Agreements have been obtained.*

...

8. The *written approval from the SC* in respect of the issuance of the Bonds and the Notes.

...

10. *Satisfactory documentary evidence that the Issuer has opened the Designated Accounts* upon terms that such account is operated by the Security Agent and *the*

notices of assignment and acknowledgement in respect of the assignment of the Designated Accounts thereof have been received.

11. *A valuation report acceptable to the Lead Arranger and from an independent valuer regarding the businesses to be purchased under the Business Sale Agreements.*

...

13. *Completion of the financial and legal due diligence carried out on the Issuer and AEM to the satisfaction of the Lead Arranger.*

...

16. *Satisfactory documentary evidence of the consent*, where relevant, *from the respective counterparties of the contracts*, insurances and performance bonds *to be assigned to the Security Agent pursuant to the Assignment and Charge and that notices of such assignment have been served and the acknowledgement of such notice duly received*.

...

PRE-BOND

[218] The duties of the lead arranger were spelt out in the planning memorandum whereby Aseam was required to ensure that all the information contained in the submission document to the SC and in the IM did not contain any false or misleading statements or material omissions. To achieve this objective, Aseam had to verify and probe, and not accept representations from persons like Kamalul at face value. Saraswathy (DW4) accepted those were Aseam's duties, which were to be performed prudently and in order to perform its duties Aseam had to understand AEM's businesses. The information gathered by Aseam would be compiled into a proposal which would be submitted to SC for its approval. Once the SC has approved the proposal, the bonds program and the terms would be reflected in the IM. The IM carries the status of a prospectus in accordance with s 38(3) of the SC Act.

[219] The bondholders contend that the following material information was omitted from the IM, contrary to s 38 of the SC Act (or s 229 of the CMSA).

(i) CR proceeds not credited directly into revenue

[220] The priority of payment and application of transfer clause in the IM stipulates:

All revenue, sale proceeds, the equity contributions and/or advances from the shareholders, insurance proceeds *and all other amounts of any kind received by the Issuer, shall be credited into the Revenue Account ...*

Based on the plain language used and wide and broad definition of 'things that will go into revenue' it means the revenue account is the only entry point of

monies coming into Aldwich. Revenue remitted from Aldwich's counterparties cannot first be credited into any of the other five designated accounts or into any other account. The revenue account (controlled solely by Aseam) is therefore the most critical feature in the entire 'ring-fencing' structure. Saraswathy (DW4) confirms this when cross-examined 'Yes, all received by the issuer'.

[221] The bondholders were not aware how these accounts were actually operated at the time of default. They were first made known of such facts during the bondholders' meeting in 2009 and later when relevant documents were produced by the defendants.

[222] Therefore I agree with the plaintiffs' submission the bondholders have established their case under ss 32B, 38 and 57 of the SC Act against Aseam in that:

> The manner in which Aseam allowed Aldwich's revenue to flow elsewhere than into the Revenue Account controlled solely by them was not only contrary to the express terms of the IM but also resulted in the breaking of the ring-fencing. Further, it rendered the language used in the Priority of Payment and Transfer of Application clause in the IM false and misleading because as a matter of fact, hardly any revenue went into the Revenue Account.

(ii) Only 15% of Aldwich's proceeds of sale credited into revenue account

[223] The second material omission in the IM, ie that only 15% of Aldwich's proceeds of sales from the CR business were credited into the revenue account. This in my respectful view will run contrary to the priority of payment and application of transfer clause in the IM which reads 'all revenue, sale proceeds' and 'all other amounts of any kind' '*shall be credited into the Revenue Account …*'.

[224] The position taken by Aseam at the time of the trial is that this clause is to be construed as '*net and actual* revenue available to Aldwich'. In other words, that only 15% of revenue, and not 100%, should have been credited into the revenue account. However I find Aseam's stand cannot be sustained for the following reasons:

(a) first, such words to that effect were not used in the IM. If that was the intention of the IM that Aseam itself drafted, these words could easily have been included: but, they were not; and

(b) more importantly, Aseam's position at trial in fact contradicts the contemporaneous documentary evidence. Vide letter dated 23 December 2008 Aseam wrote to Aldwich asking why only RM16,166,667, as opposed to RM94,476,112 as reported in Aldwich's

audited financial statements for FYE 2007, were credited into revenue. The sum of RM94,476,112 is mentioned in the income statement of Aldwich's audited financial statements for FYE 2008, the material parts of which reads:

	Note	2008 RM	2007 RM
Revenue	18	224,792,135	**94,476,112**
Cost of Sales		(197,668,607)	(76,107,645)
Gross Profit		27,123,528	18,368,467

(Emphasis added.)

Aldwich's audited financial statements recognised 'Revenue' as gross, before any deduction of 'Cost of Sales' therefrom. Thus, it can be seen as late as 23 December 2008 (more than five years after the bonds were issued), Aseam:

(a) still believed that 100% of sales proceeds ought to be credited into Aldwich's revenue account, consistent with the clear and unambiguous language used in the IM;

(b) Aseam was aware that: (i) Aldwich was only crediting 15% of sales proceeds into revenue; and (ii) such practice was contrary to the bond scheme;

(c) vide its subsequent letter dated 18 February 2009 Aseam reminded Aldwich of its obligation to credit all proceeds into the revenue account by relying on cl 7(b)(i) of the assignment and charge wherein it is significant to note that Aseam has stressed on the words 'all revenue and income' in the second para of the aforesaid letter which reads:

> As Security Agent, we wish to draw your attention that pursuant to Clause 7(b)(i) of the Assignment and Charge dated 22 May 2003 ('Assignment and Charge'), the Issuer undertakes and covenants to the Security Agent that it will forthwith pay and cause to be paid, from time to time, all Cashflow Proceeds ie *all revenue and income* received by and paid to the Issuer and any other receipts of a capital or revenue nature, including (but not limited to) sales proceeds, equity contributions and/or advances from shareholders, insurance proceeds and all other amounts of any kind (other than the proceeds from the issue of the Bonds and the Notes) into the Revenue Account ...

It is my respectful view that it does not make sense to have the second paragraph in the letter if Aseam was always clear in their mind that Aldwich would only receive 15% revenue.

In fact the best evidence that Aseam was conscious of Aldwich's obligation to remit 100% (not 15%) of the sale proceeds into revenue account comes from Kamalul when cross-examined on the second paragraph of the Aseam's letter dated 18 February 2009:

> TT Maybank Investment (MIB). *You agree that they now, they have pointed to the correct contractual position?*
>
> KML *Yes, My Lady.*
>
> TT *You accept that?*
>
> KML *Yes.*
>
> TT *They were correct then?*
>
> KML *Yes.* (Emphasis added.)
>
> (NOP5/Day 22/pp 126–127/lines 16–12.)

[225] Aseam's attempt to now suggest that it was at all material times within their knowledge that only 15% of the proceeds would be remitted into the revenue account is clearly without basis since it is Aseam's submission that the reason as to why the purported revenue split which was initially 25% 'later became 15% was explained by PW1 Kamalul bin Arifin to be because there was an increase in the price of precious metals and therefore, Petronas and its related companies that were Aldwich's counterparties had revised the revenue margins'. Had the 15% revenue split been within the contemplation of Aseam 'since day one' as suggested by Aseam's witness, Saraswathy, the IM ought to have stated so. However as alluded to in para 223 above, the IM unequivocally requires *all* revenue and sales proceeds, inter alia, to be credited into the Aseam-controlled revenue account.

[226] Aseam submits that the 15% revenue split was disclosed to the bondholders vide the IM in the cashflow projections and assumptions and in the RAM Reports of July 2003 and September 2004. With respect this is not true for the reason succinctly stated by the plaintiffs:

> The reference made by RAM that AEM '... typically earns an average margin of 25% on the final selling price of the metals recovered' [D8/1–28 at p 13] in no certain terms corroborate what they allude to. In fact, the IM refers to a purported 25% revenue split, and not 15%. Under no circumstances was the 15% revenue split disclosed to the Bondholders through the IM or otherwise ...

[227] Aseam further submits that even if 100% of the total revenue had been credited into the revenue account, the contracts with the counterparties would have required the 85% to be returned to the counterparties, and therefore it would not have made a difference to the income of Aldwich and the net cash available in the revenue account. With respect I disagree. What is critical is had

100% of the proceeds been remitted into the revenue account, all sums would have been within the control of Aseam as signatory of the revenue account: Aseam would have been able to independently verify and ascertain the sums deductible for return to counterparties, and to be paid in accordance with the priority of payment and the approved budgets. Thus the bondholders were deprived of the benefit of having Aseam exercise control and supervision over all 100% of the sale proceeds that ought to have been remitted into the revenue account; despite the bondholders being assured of it in the IM.

(iii) Non-receipt of the acknowledgments

[228] The bondholders complaints under this head of argument are:

(a) that Aldwich had not assigned all its rights, benefits and titles under all revenue/sales proceeds, service contracts, resources, order books, equity contributions and/or advances from shareholders, insurance proceeds and all other amounts of any kind received by Aldwich;

(b) that Aldwich/AEM had not obtained all the acknowledgment of the notices of assignment/letters of novation from its counterparties of AEM's contracts to Aldwich;

(c) that Aldwich had not obtained all the acknowledgement of the notices of assignment of all its business contracts to Aseam; and

(d) that Aldwich had not secured the agreement of the business contract counterparties to pay the proceeds of their contracts directly into the revenue account controlled solely by Aseam.

[229] It is noteworthy that the source of repayment and redemption of the Aldwich bonds is the future cash flow generated from Aldwich's business. The novation or assignment by AEM to Aldwich of the business contracts, viz, all existing and future contracts and engagements of AEM relating to the catalyst recovery and tank cleaning business and the intended business in waste oil recovery, and their subsequent assignment by Aldwich to Aseam were accordingly one of the key security features in the issuance of the bonds to complete the ring fencing.

[230] CP 20 (also appears in CP 16 of the subscription agreement) reads:

> Evidence of the consent, where relevant, from the respective counterparties of the contracts to be assigned to the Security Agent pursuant to the paragraph bearing the heading 'Security' and that *notices of such assignment have been served and the acknowledgments of such notices duly received*.

CP 20 in the IM required Aseam, before releasing the bonds into the market, to be satisfied that the notices of assignment of the contracts to Aseam were not

only served on Aldwich's counterparties, but that the acknowledgments must also be duly returned. In addressing the case against Aldwich and AEM I find:

(a) some counterparties however refused to give consent to the assignment of Aldwich's contracts to Aseam, and no acknowledgments were returned to Aseam. This was not stated in the IM; and

(b) most of the counterparties to AEM's business contracts refused to consent to the novation or assignment of those contracts to Aldwich. In consequence, Aldwich was not in a position to assign those AEM contracts to Aseam. It was against that background that Aldwich entered into two supplemental BSAs with AEM on 7 August 2003 which were never disclosed to SC, RAM or to the market. The two supplementary BSAs were also not stated in the IM.

[231] Aseam argues that having the benefit of its solicitors' opinion that the notices of assignment had been sent out to the respective counterparties and that notice alone is sufficient, there was no legal requirement for the counterparty to agree or consent. With respect this contention is misplaced for these reasons:

(a) Aseam in submission states '*Pesaka No 1* (*Pesaka* (FC) judgment) is clear authority that a lead arranger is quite entitled to rely and act on their legal advisor's views' relying on p 198 paras [78]–[81]). I am mindful of this legal principle. A poser is did Aseam really heed Albar's views in the circumstances of the present case? In this connection I refer to paras 55–56 above where I have referred to Albar's advice to Aseam vide letter dated 12 August 2003. It is my respectful view that Aseam acting on Albar's view exercised its own discretion thereafter. Here what law and business prudence required Aseam to do was to postpone the release of the bonds and take the necessary steps to comply with the CP. There was no need to rush to release the bonds on 12 August 2003. I find despite Albar's legal advice that the bonds be issued subject to the fulfilment and compliance by the borrower of the outstanding conditions, Aseam permitted the bonds to be issued without these conditions being fulfilled;

(b) the sample notices appended to the assignment and charge (to which Aseam was a party) itself contemplates the acknowledgment by the counterparty and return thereof, with the counterparties' consent to the assignment, and agreement to pay all proceeds into the revenue account. It contradicts CP 20 in the IM and cll 3.1 and 5.2 of the assignment and charge;

(c) Aseam's failure to ensure that the consent of the counterparties to the assignment was secured, and the notices of assignment were acknowledged and returned has serious implications. This can be seen

from the evidence led at trial where proceeds from the sale of catalyst were remitted into AEM's accounts and/or, inter alia, the disbursement account controlled by Aldwich and not the Aseam-controlled revenue account despite the terms of the IM and the notices of assignment expressly directing the counterparties to pay the proceeds into the revenue account; and

(d) since the counterparties to the AEM/Aldwich business contracts did not consent to the assignment of their contracts to Aseam, and to pay the proceeds into the revenue account, it was open to AEM and Aldwich to instruct their counterparties to pay the proceeds of those contracts into any account they so wished. This is clearly illustrated by the payments of some of these proceeds of sale by HSBC London USA to the disbursement account, controlled by Aldwich, and not the revenue account, controlled by Aseam, It totally demolished the ring fencing of Aldwich's revenue and sale proceeds which were ear-marked for the redemption of the Aldwich bonds. In this regard, I find that despite discovery, at trial, Aldwich, Kamalul and AEM failed to prove and account for all its relevant business contracts.

[232] As the plaintiffs correctly submit, Aseam's reliance on s 4(3) of the Civil Law Act 1956 and the cases of *Mohamed Tawfik bin Tun Dr Ismail v HLG Credit Sd Bhd & Anor* [2012] 2 MLJ 626 and *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365 is misplaced as those authorities deal with the assignments in the 'Administration of insolvent estates, and winding up of companies' unlike the assignments in the Aldwich bonds programme were at the time of the issuance of the Bonds contemplated in the ordinary course of business. The authorities relied on by Aseam do not apply to the context of this case, where the consent of the counterparties are expressly required: see *Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors* [2015] 3 MLJ 791 (CA) at p 808 para [31], p 809 para [32] and p 811 para [37].

[233] Aseam attempts to argue that they were waiving these CPs. However I find nothing turns on this point as even Saraswathy accepted such a waiver cannot be effectively done by Aseam as primary subscriber because of the serious impact to future bondholders (NP6/Day 27/p 91 line 22 to p 91 line 35). Further, Saraswathy (DW4) testified after the bonds were issued on 15 August 2003 until September 2004, Aseam took no steps whatsoever on those acknowledgements as advised in Albar's letter of 12 August 2003. In fact even Tan Kah Yin (DW7) of Mayban Trustees was surprised that after the bonds were issued for so many years, Aldwich only managed to have two or three acknowledgements in their records when acknowledgments for some 15–20 contracts were supposed to have been in Aseam's custody (NP8/Day

A 31/p 74/lines 12–28). It was only 5 1/2 years after the bonds were issued that Aseam enquired about the acknowledgments from Aldwich as I have alluded to at para 80 above.

NON-ASSIGNMENT OF HSBC BULLION AGREEMENTS

B

[234] It is not denied that AEM's bullion agreements dated 3 November 2000 and 6 November 2001 contained a non-assignable clause (see para 50(b) above). Having the prior knowledge of the AEM's bullion agreements upon review with the other four members in the DDWG, business prudence will C dictate Aseam to postpone the release of the bonds and to take necessary steps to comply with CP 20 or alternatively to amend the IM to reflect the true position.

D **[235]** Similarly the Aldwich bullion agreement dated 24 June 2003 and the unallocated bullion agreement dated 26 June 2003 contained nonassignable clauses (see para 51 above). However there was no disclosure by Aseam and the other four members of DDWG of the fact that these Agreements were not assigned in satisfaction of CP20 or that they were incapable of being assigned E was made in the IM despite it is a fact known prior to the issuance of the bonds. It is pertinent there is absence of 'ring-fencing' (security) over the proceeds under both these agreements. The reason being the trust arrangement contemplated by the BSAs and/or supplemental BSAs only cover agreements entered into by AEM and its counterparties and does not cover agreements F entered into by Aldwich such as the Aldwich bullion agreement and the unallocated bullion agreement. In this regard I adopt what I have stated at para 135 above that evidence was led by the plaintiffs that some sale proceeds from the CR business were remitted into Aldwich's disbursement account and I had drawn an adverse inference under s 114(g) of the Evidence Act 1950 G against Aldwich/AEM and Kamalul for non-production of:

(i) the money account statements; or in the alternative;

(ii) there was in fact no money accounts maintained by them at HSBC Bank London, the documents evidencing the sale of the metal, in their metal H accounts with HSBC Bank London, and the amount of proceeds realised from those sales.

I am of the view that it is critical that the failure to novate and assign the Aldwich bullion agreement and the unallocated bullion agreement be set in the I IM and failure to do amounts to a material omission as will become apparent in paras 236–237 below and the subparagraphs thereunder.

DISCLOSURE OF TRUST ARRANGEMENT BY WAY OF SUPPLEMENTAL BSAS PRIOR APPROVAL FROM SC OF THE TRUST ARRANGEMENT

[236] Aseam contends the concept of a trust on the part of AEM in favour of Aldwich was disclosed in the IM and as such, it was for the bondholders to make an informed decision to invest in the Aldwich bonds in those circumstances. The contentions can be summarised as follows:

(a) the BSAs (as detailed in paras 40–42 above) and the supplemental BSAs (as detailed in para 54 above) contained a declaration of trust; the former found in cl 13.3 of BSA 1 and cl 20.3 of BSA 2 respectively and in the latter, cll 2.4 of the second supplemental BSA 1 and supplemental BSA 2;

(b) the plaintiffs accept that BSA 1 and 2 were made known to the SC and were expressly mentioned in the IM:

> Paragraph 8.1 under the rubric 'Business Sale Agreement dated 13th May 2003 ('BSA 1')' of the IM:
>
> > Pending the novation, the benefits and rights of such contracts will be held in trust by AEM for the Issuer.

(c) ASEAM acted on the advice of Messrs Albar & Partners based on a legal opinion dated 7 August 2003 (D15/416–418) which Aseam was entitled to act on the solicitors' advice following the decision of *Pesaka* (FC) judgment. The advice was the trust arrangement effected by way of the supplemental BSA 1 and 2 would not result in a variation of the security arrangement. Aseam takes the position arising from the solicitor's advice:

  (i) there was no departure from the structure of the bonds already approved by the SC; and

  (ii) the question of MIBB having to seek the prior approval of the SC does not arise.

[237] With respect, Aseam's abovesaid contentions are without merit. My reasons are these:

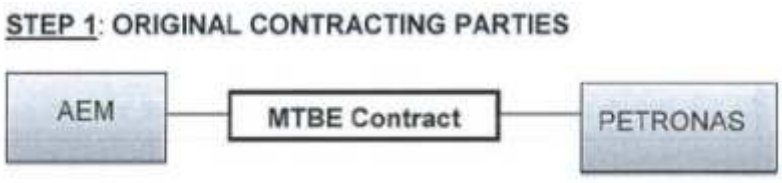
(a) first, it must be noted that the bondholders did not have access to the supplemental BSAs and all other bond contracts. Evidence was led through Andrew Leong (PW8) that it is market practice that apart from the IM, the other bond contracts are not circulated to potential purchasers when the bonds are being marketed and are not even made available upon purchase of the bonds (Q&A 38 and 39 WSPW8). I find no evidence to the contrary was led by the defendants;

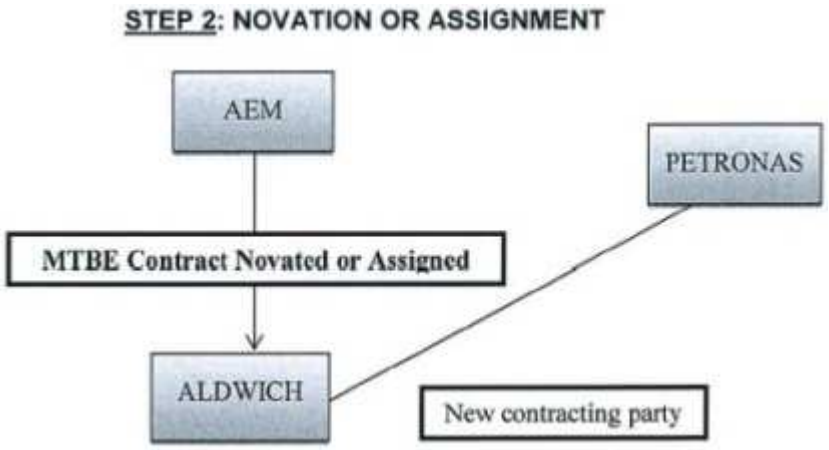
(b) I adopt what I have stated when dealing with the bondholders' complaints against AEM and Aldwich under the heading 'Failure disclose Supplemental BSAs' at paras 143–147 above regarding the trust arrangement and its implication thereof. I agree with the plaintiffs' submission 'until such contracts are novated by AEM to Aldwich, thus allowing Aldwich to step into the shoes of AEM, Aldwich would not be able to assign them to Aseam. And the assignment of all these contracts by Aldwich to Aseam was a condition precedent in the IM (CP 20) to the issuance of the Aldwich Bonds';

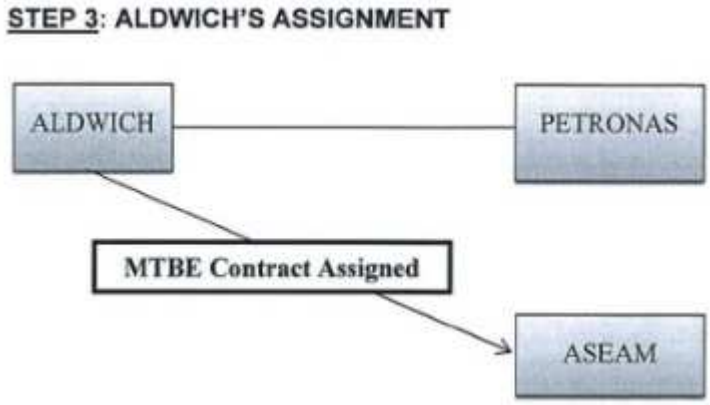
(c) I wholly agree with the plaintiffs' highlight of the distinction between 'novation' and 'assignment' found in *Halsbury's Laws of England* 5th Ed (2012) where the learned commentators have stated as follows:

> *Novation occurs where one contract is substituted with another, either between the same parties or different parties, the consideration usually being the discharge of the old contract*. However, where the 'new' contract modifies the old contract between the same parties, this has come to be termed a variation; and the expression *'novation' has more recently tended to be used rather for the situation where the acts to be performed under the old contract remain the same, but are to be performed by different parties. Hence, novation requires a subsequent binding contract, and the consent of all parties*. Where the new part takes over liabilities formerly resting on one of the original parties, it is a question of construction whether he takes them over with or without the benefit of time which has run under statutory rules of limitation.
>
> *Novation should be distinguished from assignment.* At common law novation was the only known method of assigning a contractual right. In modern law, contractual rights, but not liabilities, may, as a general rule, be transferred by assignment without the consent of the promisor. *Novation, however, is an act whereby, with the consent of all parties, a new contract is substituted for an existing contract and the latter discharged*. (Emphasis added.)

(d) further understanding of the distinction between 'novation' and 'assignment' is enhanced by the diagrammatic illustration of the plaintiffs depicting the relationship between the parties in respect of the MTBE Agreement under BSA1 shown below:







(e) by the supplemental BSAs the AEM's contracts that are being purchased by Aldwich are not novated; but AEM will continue to receive the proceeds of such contracts on trust for Aldwich and to pay the same to revenue. This however was never disclosed in the IM. I agree with the plaintiffs' submission that the practical ramification is '[T]hose contracts that are not novated or assigned by AEM to Aldwich, will not be able to be subsequently assigned by Aldwich to Aseam, with the counterparties not agreeing to pay the proceeds of such contracts directly into Revenue, and subject to the ring-fencing, thereby rendering CP 20 in the IM misleading and/or false'.

POST-BOND

(i) Monitoring of the designated accounts

[238] As alluded to in paras 46–47 above, Aseam controlled five of the designated accounts. One of principal complaint by the bondholders against Aseam acting as the facility and security agent in the Aldwich bond program is the failure to properly monitor the movement of monies into the designated accounts in accordance with the IM and bond contracts, and to ensure that all cashflow proceeds were paid by Aldwich into the revenue account.

[239] In essence Aseam in submission states:

(a) Aseam was under no obligation to ensure that all of Aldwich's revenue was paid into the revenue account as its role was limited to ensuring that the monies deposited in the revenue account were correctly applied in accordance to the 'waterfall' priority of payment; and

(b) it was never the intention to 'ring-fence' all revenue or sales proceeds that were intended to be paid or paid into the revenue account. Only revenue or sales proceed paid into the DSRA was intended to be ring-fenced for repayment of the bonds. In the event of insufficient revenue or sales proceeds to cascade down to the DSRA in accordance with third order of priority, Aldwich would still be obliged to source for funds to make the DSRA payments or to redeem the bonds, as the case may be.

[240] I am of the respectful view that Aseam's views are without merit for these reasons.

From Saraswathy, Head of Corporate Banking, the relevant department to deal with Aseam's roles as facility and security agent and hence had personal knowledge of these matters, the following evidence is gleaned when cross-examined by the counsel for the plaintiffs:

(a) Aseam had the duty to have proper control of the five designated accounts (NP6/Day 27/p 55/lines 25–30);

(b) as Aseam was controlling the accounts, it had an obligation to ensure that Aldwich operated those accounts in accordance with the terms of the IM and bond contract (NP6/Day 27/p 111/lines 5–32);

(c) there was contemporaneous evidence by way of the minutes of a bondholders' meeting held on 13 January 2010 (D13/249 at 253) (also attended by Saraswathy that Aseam monitored the movement of the funds in the revenue account, and did not rely only on Aldwich's onfirmation letter). Having held this position that Aseam 'monitors the movement of funds in the Revenue Account' in 2010, it is odd for Saraswathy to refuse to accept that Aseam was required to monitor the accounts but state:

SARAS No, we are administrative. We don't need to monitor.

(d) it is unacceptable for Saraswathy as one of the signatories to the revenue account and recipient of the monthly bank statement did not notice that there was hardly any activity in revenue account for some six years. In fact even Aldwich's interim CFO, Shahir (DW2) was surprised as can be seen from his evidence when re-examined by counsel for first, second and third defendants seeking clarification regarding his assumption that Aseam knew 'monies being credited into the Disbursement Account instead of Revenue Account' when cross-examined by counsel for fourth and fifth defendants. The material part of his evidence appears at NP6/Day 26/p 17 line 1 to p 19 line:

SHAHIR: I found out about this through the revenue account, not from the disbursement account. And another reason is that I believe since the revenue account is operated by the MIB, it is also within their powers to check on this. It is part of the function of a facility agent.

...

[After reference to the Bondholders Minutes of Meeting on 13/1/2010] So it is actually a fair assumption and it is quite factual in the case that they are actually looking at this account.

(e) (e) Mayban Trustees' Tan Kah Yin (DW7) in cross-examination expressed surprise when he heard, amongst others about the non-crediting of the sale proceeds into the revenue account by the issuer and that the Aldwich was only aware of the non-compliance when Shahrir took over the position as interim CFO and the 15% sale proceeds were credited into disbursement account instead of into revenue account. Tan Kah Yin explained he was surprised 'Because they didn't follow the waterfall payment' and 'this has been going on for some time'. (NP8/Day 31/p 72 line 33 to p 74 line 4.)

[241] Clause 3.2 of the assignment and charge expressly stipulates that all the five designated accounts formed part of the charged assets that were charged to Aseam. Monies in those accounts were also held in trust by Aseam on behalf of the bondholders (cl 2.2 of the security agency agreement). This was confirmed by Saraswathy when cross-examined by counsel for first, second and third defendants.

[242] The evidence establishes that Aseam was equally oblivious of what was happening to the designated accounts:

(a) Saraswathy was unaware that 25 separate payments totalling RM83m were remitted from HSBC Bank USA to the disbursement account, when shown exh P3 by counsel for the bondholders. These payments

ought to have been credited into the revenue account, as accepted by Saraswathy herself (NP7/Day 29/p 101 line 21 to p 103 line 2);

(b) Saraswathy also had no knowledge of the payments of RM166m in exh P5 made from Aldwich's disbursement account to AEM's account at the material time. She failed to explain why monies were flowing in the opposite direction, that is, from Aldwich to AEM and not the other way around as required by the two supplemental BSAs. It is clear that Aseam's lack of care and attention allowed Aldwich to pay out RM166m (NP7/Day 29/p 104 line 2 to p 105 line 8);

(c) Saraswathy was unable to explain why trust monies under the supplemental BSAs which ought to have flowed from AEM to revenue (listed in exh P6), were instead credited into disbursement (NP7/Day 29/p 105/lines 10–30);

(d) Saraswathy was unaware that RM16.7m of Aldwich's monies (tabulated in exh P7) were paid out from disbursement to Kamalul, allegedly for repayment of loans allegedly extended by him, which transaction was not documented in any way and seemed a sham (NP7/Day 29/p 15 line 19 to p 16 line 11);

(e) Saraswathy was not able to explain entries made in the monthly bank statements of revenue (D4/21–22), controlled by her and her Aseam colleagues, and copies of which were received by Aseam. This is ironic bearing in mind she was a signatory to revenue account and yet said 'I can't comprehend the details' (NP7/Day 29/p 15 line 19 to p 16 line 11);

(f) if Saraswathy had acted as a true gatekeeper and custodian of these accounts, she would have observed from the monthly bank statements that monies were flowing from disbursement to revenue (D4/1–113, revenue account bank statements). To Saraswathy, Aseam's only duty was to ensure that sufficient monies were built-up in DSRA to redeem the next tranche of bonds. (NP7/Day 29/p 22 line 2 to p 23 line 1);

(g) Saraswathy never appreciated that her role includes the monitoring of payments out of revenue by Aldwich, and for the 'correct' purposes under the bond scheme. (NP6/ Day 27/p 107 line 7 to p 108 line 14);

(h) Saraswathy was unaware of three other accounts bearing account Nos 512268-303702, 513023-724440 and 514011-804528 opened by Aldwich. In fact, Aseam did not know how many accounts Aldwich had opened in total during the tenure of the bonds because they were not monitoring Aldwich. In consequence, more than 98% of Aldwich's monies were placed in fixed deposits, not controlled by Aseam, a fact which was also not known to Saraswathy. This is best illustrated by

viewing exh P10 (Aldwich's accounts), item 7 (E/1697), items 8 (E/1713), item 9 (E11/2313 and C8/328). (NP7/Day 29/p 35 line 15 to p 36 line 1);

(i) Aseam was unable to produce any document to prove that AEM had complied with its undertaking under the supplemental BSAs to immediately credit all 'trust' monies it received from counterparties into revenue. (NP7/Day 29/p 13 line 18 to p 14 line 12);

(j) Aseam also did not take any steps to ensure that AEM would perform its undertaking to immediately remit all monies it received to revenue pursuant to the supplemental BSA. It is undisputed that Aseam had contemporaneous knowledge of the existence of the supplemental BSA. (NP6/Day 27/p 126/lines 3–28); and

(k) Aseam relied on Aldwich's auditor, EY without conducting any independent verification for eg, when cross-examined in relation to the confirmation of the projected debt service cover ratio ('DSCR') for the year ending 30 June 2006 which was 5.81 times for actual DSCR and 2.54 times for projected DSCR (D1/303–304). (NP7/Day 28/p 10/lines 8–28).

[243] In the light of the abovesaid evidence and bearing in mind that: (i) Aseam was the sole signatory to the revenue account, which account was represented and meant to be the only entry point of all monies coming into Aldwich and solely controlled by Aseam; and (ii) the requirement for payments into the revenue account to cascade in the manner of the priority of payment (ie the 'waterfall approach/arrangement'), Aseam could only fulfil these obligations by monitoring the designated accounts and ensuring that all Aldwich's cashflow proceeds under the BSAs were in fact credited according to the 'ring-fencing' structure prescribed in the IM.

[244] Aseam's submission that the monies remitted into the revenue account were not specifically earmarked or impressed with a trust for the sole or dominant purpose of repayment of the bonds is flawed as it fails to consider that the monies in the revenue account and the four other designated accounts except disbursement account which formed part of the charged assets were held in trust by Aseam on behalf of the bondholders. This is evident from the security agency agreement: (i) definition of 'Charged Assets' (B1/136); (ii) cl 2.2 (trust) (D1/139); and (iii) Appendix A (charged assets). Therefore Aseam's control over the monies in the revenue account and its policing over the manner in which the monies cascaded was not only crucial but was a feature of the bonds programme.

[245] Contrary to the submission of Aseam, the priority of payment and how the monies flowed through had considerable bearing on Aldwich's ability to redeem the bonds as it would safeguard against any misuse or siphoning of the funds.

The IM (B3/569) stipulates that:

> The Security Agent shall remit on a quarterly basis, amounts from the Revenue Account into the Disbursement Account for the payment of operational and administrative overheads, capital expenditure, professional fees and expenses related to the issuance of the Senior Bonds based on the Annual Budget Clause. A minimum balance equivalent to two months of the estimated Annual Budgeted Operational Expenses shall be maintained in the Disbursement Account.

This means not all monies received in revenue are paid into the disbursements account: Aseam was only to remit on a quarterly basis amounts based on the annual budget (elaborated in paras 248–252 below) into the disbursement account. Pursuant to the IM (B3/565) the annual budget was to be duly endorsed by EY as the external auditors with Aseam's agreement required for the budget items. There is no evidence before the court that EY had endorsed any of the annual budgets. Ken Pushpanathan (DW8) testified that EY was not even provided with the annual budgets. Aldwich never once requested for Aseam to pay monies from the revenue account into the disbursement account, whether pursuant to the annual budgets or at all, as none of the proceeds of the business contracts were paid directly to the revenue account, in breach of the bond contracts and the statements in the IM.

[246] The argument that for six years there was sufficient monies going into the DSRA does not in any way absolve Aseam from its policing duties. It is unbelievable for Aseam to now suggest that they only discovered the anomaly in January 2010 since they were the sole signatory to the revenue account and were in receipt of the bank account statements. In this regard I adopt what I have alluded to at para 242 above and the subparagraphs thereunder.

[247] Paragraph 102(i) of the statement of claim sets out the false or misleading information or statements in the IM. Paragraphs 102(ii), (iii) and (iv) sets out the material omissions in the IM. In this regard, it is obvious that the failure to abide by the terms/statements set out in the IM renders such terms/statements false or misleading, and implementing the bonds programme in any other way other than in the manner stipulated in the IM, would render it material omissions. Hence I find Aseam's submission that 'Non-implementation of the Priority of Payment Clause, as alleged and which is denied, does not render the clause false or misleading' bears no merit.

(ii) Annual budget

[248] Another complaint of the bondholders is the failure of Aseam to ensure Aldwich's compliance of the annual budget mechanism as per the IM and the trust deed. The material parts of the IM relating to the annual budget read:

> The Issuer shall be required to deliver an Annual Budget together with an Annual Projected Cashflow duly endorsed by an external auditor acceptable to the Facility Agent acting as agent for the Primary Subscribers prior to the issuance of the Senior Bonds and Junior Notes and thereafter as agent for the Trustee, not later than fourteen (14) days prior to expiry of each Annual Budget, with the first Annual Budget being delivered no later than the date of execution of the Issue Documents.
>
> Upon satisfaction of the above mentioned financial test and condition in respect of the Annual Projected Cashflow as duly endorsed by the external auditor and to the satisfaction of the Facility Agent, the Annual Budget shall become an Accepted Budget.
>
> (C2/549 at 666–667.)

[249] Kamalul accepted the process of preparing the annual budget during cross-examination as follows: Aldwich to initially prepare annual budget, which had to be submitted to EY for its endorsement. It would then be submitted to Aseam acting as facility agent. The 'annual budget' would then be accepted only if Aseam agreed to its contents. It would then become an 'Accepted Budget'. Kamalul, Saraswathy and Pusphanathan (DW8) accepted that 'annual budget' and 'annual projected cash flow' represent two different 'things', though they could not agree whether the two could be included in a single document.

[250] When cross-examined regarding the duty imposed on Aseam, Saraswathy said that 'we are not the reporting accountant to go and test the company. We basically accept the professional confirmations' and 'it's administrative'. (NP6/Day 27/p 141 line 22 to p 143 line 10.)

[251] From the cross-examination of Saraswathy it became clear that:

(a) as per the submission of the plaintiffs, 'it defies common sense and logic that Aldwich was unable to make a RM1.667 million DSRA payment in August 2009 when EY had certified Actual DSCR at 1.85 times (which meant that Aldwich had actual cash exceeding RM47 million for the year ending 30th June 2009) and Projected DSCR at 4.1 times (which meant that Aldwich was projected to have generated more than RM49 million for the next 12 month period commencing 1st July 2009). Yet Aseam accepted EY's DSCR calculation, even though Aldwich defaulted in its DSRA payment only 2 months after a strong DSCR certification from EY'.

(NP7/Day 28/p 13/line 7–30); and

A (b) Saraswathy adamantly refused to accept that EY's DSCR calculation was flawed when cross-examined despite the optimistic certification of 18 June 2009 (D2/648) which she saw at end of June 2009 and the fact there was 'not a single monthly DSRA was paid in for about 7 months from 21/8/2009' (letter of demand from Aseam to Aldwich) regarding B 'Required Amount to be deposited into [DSRA]' till R&M were appointed on 8 March 2010.

(NP7/Day 28/p 16 line 7 to p 17 line 22.)

C **[252]** It is my respectful view that Aseam had a duty under the IM to review the annual budget that was presented by Aldwich and duly endorsed by EY before accepting it. Aseam's knowledge of the contents of the annual budget was critical for the operations of the disbursement account, because the IM stipulated that:

D > A minimum balance equivalent to two months of the estimated Annual Budgeted Operational Expenses shall be maintained in the Disbursement Account.

The words 'to the satisfaction of Facility Agent' must be given its ordinary E meaning in the context of a commercial transaction. It is therefore integral to the ring-fencing mechanism which must be secured by Aseam as facility and security agent at all material times.

(iii) Satisfaction of CP for the release of RM59m held in escrow account

F

[253] Another principal complaint of the bondholders is Aseam's failure to ensure that the conditions precedent for the release of the RM59m (RM59,449,961 to be exact) held in the escrow account ('RM59m') had been properly and completely met prior to releasing those monies to AEM.

G

[254] RM59m is the amount from the proceeds of the issue of the senior bonds which Aldwich is obliged to pay into the escrow account (cl 7(b)(vi) of the assignment and charge). Aseam's obligation in relation to the release of the H funds deposited in the escrow account is provided for in Appendix D to the assignment and charge (D11/588, cl 1 titled 'Escrow Account'). There are two conditions to be satisfied before Aseam could release the RM59m:

(a) the WOR plant had to be completed within 18 months from the issue date of 15 August 2003; and

I

(b) Aldwich had to secure the sale of at least 80% of the installed capacity of the waste oil plant by long term (ie for a term of at least one year) sales contracts.

[255] The bondholders submit that despite the clear words in the IM that Aseam must be satisfied and conceding that Aseam was required to be careful and prudent in considering AEM's request for the release of the RM59m, Saraswathy admitted that Aseam accepted AEM's request for the release of the monies without any independent verification as she has the mind set that Aseam's role was purely ministerial and administrative. These is clearly evident from her responses given in cross-examination by counsel for the plaintiffs.

(NP7/Day 28/p 41 line 25 to p 42 line 25.)

[256] With respect in my judgment there is no obligation on Aseam to conduct an independent verification of the WOR plant for the release of monies in the escrow account. My reasons are as follows. I agree with Aseam's submission the conditions precedent for the release of the RM59m have been met:

(a) the waste oil plant was certified as completed and delivered by Aldwich Industries Sdn Bhd ('AISB') under the EPCC of waste oil to diesel plant at Teluk Kalung industrial estate contract on 27 January 2005, that is within 18 months after the issuance of the bonds, hence rendering the BSA 2 dated 13 May 2003 executed by AEM and Aldwich unconditional; and

(b) by a contract between Aldwich and Perusahaan Kimia Gemilang Sdn Bhd ('PKGSB') dated 7 January 2005, Aldwich secured sale of at least 80% of the installed capacity of the waste oil plant for a term of at least one year to the satisfaction of Aseam ('supply contract').

[257] The taking-over certificate and the supply contract were received by Aseam on 28 January 2005 from Messrs Adnan Sundra & Low confirming that the unconditional completion of the BSA2 dated 13 May 2003 had been achieved and instructions were given for Aseam to release the RM59m. Paragraph (i) of the taking-over certificate dated 27 January 2005 (D1/283–286 at p 283), amongst others states '(AISB) has completed the work, thereof as detailed below (including passing the tests on completion), *and … minor [defects] which are detailed in the attached Schedule of Defects [do] not affects the use of the Works for their intended purpose*'.

[258] Aseam alleges the plaintiffs have raised three issues in relation to the release of the RM59m which were not pleaded:

(a) the relationship between the turnkey contractor, AISB and Aldwich;

(b) the 'teething problems' of the WOR plant; and

(c) the one year supply contract should not have been regarded as a 'long-term' contract.

A With respect I disagree with Aseam's submission that these three issues were not specifically pleaded; I am of the view that these issues are covered by the pleaded case of the plaintiffs at para 97(iv) of the statement of claim.

B **[259]** As a matter of evidence I find there these three issues of the plaintiffs are without merit for the following reasons:

(a) on the issue of 'turnkey contractor', I find there is evidence that AEM was wholly owned by AISB and Kamalul was disclosed in the IM and the preliminary IM. Chapter 8.3 of the IM explains that AEM has C appointed AISB as the turnkey contractor for the construction of the WOR plant by way of an engineering procurement and construction contract dated 18 July 2003. Andrew Leong (PW8) confirmed that this fact was disclosed to the bondholders in the IM and 'independent verification is not something that was set out in the contracts';

D (b) on the issue of 'teething problems', it was reported by RAM that the: (i) WOR plant faced teething problems and was shut down for three months for process enhancement works; (ii) that a fire broke out at the WOR plant sometime in July 2005 causing another closure for safety checks and insurance investigation work. Despite this, in November E 2005 and December 2005, the initial ratings of the senior bonds and junior notes were reaffirmed. RAM had stated that Aldwich's debt servicing ability remained strong because the catalyst recovery business was strong. This was 'underpinned by larger quantities of recovered platinum and strong platinum prices'. RAM had reported that the F catalyst recovery business had contributed to approximately 98% of Aldwich's revenue. Further, the bondholders had never raised the issue of the release of the RM59m with Aseam or with Aldwich during any of the bondholders' meetings held; and none of the bondholders' minutes of meetings or in any documents available is there any indication that G the downgrade of the ratings of the senior bonds were due to the 'teething problems' of the WOR plant as confirmed by Andrew Leong; and

(c) on the issue of 'long term contract', the testimony of Andrew Leong that H the supply contract for a term of at least one year does not amount to a long term contract cannot stand given the BSA 2 specifically states that the condition precedent in this regard is as follows:

> (h) at least eight percent (80%) of the installed capacity of the Waste Oil Plant I is secured by long term (ie *having a duration of at least one year*) sales contracts satisfactory to the Project Agent. (D11/184.) (Emphasis added.)
>
> Further, the bondholders had the benefit of the RAM announcement on 4 February 2005 which specifically states that the supply contract was for the period of one year as confirmed by Andrew Leong.

[260] For the reasons above, I find the bondholders have established their case against Aseam for negligently performing its duties as lead arranger and facility and security agent in acting contrary to the terms of the bond contracts. I also find the bondholders have established the statutory cause of action against Aseam under ss 57 and 153 of the SC Act for breaches of ss 32B and/or 38 of the same.

No Reliance on the IM

[261] In essence Aseam and Maybank Trustees in submission state the bondholders placed very little reliance on the IM or preliminary IM as the decision to purchase the Aldwich bonds was primarily motivated by: (i) the strong AAA rating assigned to the senior bonds by RAM; and (ii) the cashflow projections. With respect this submission cannot be sustained.

At the outset I wish to state in assessing the witnesses, I am conscious of Aseam and Mayban Trustees' submission that 'the credibility of the witness cannot and should not be judged solely based on whether the opposing Counsel was able to extract 'admissions' from the particular witness' but to also give heed to the principle that where there was conflict of evidence, to test the evidence against contemporaneous documents (per Wan Hamzah SCJ (as he then was) approving *Armagas Ltd v Mundogas SA; The Ocean Frost* [1985] 1 Lloyd's Rep 1 in *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 at p 36I right to p 37A–C left).

[262] Under the heading 'Purpose' in the opening paragraph of the Important Notice of the Aldwich bonds IM, it is clear that 'Aldwich has issued this [IM] ... for the sole purpose of assisting them to decide whether to subscribe or purchase the Senior Bonds and/or the Junior Notes'.

[263] In the case of the *first plaintiff, AmTrustee* (see para 5 above), there are two categories of senior bonds:

(a) the first category comprise: (a) RM1.5m senior bonds for AmLife Insurance Bhd's funds ('AmLife'); and (b) RM1.5m senior bonds for AmGeneral Insurance Bhd's funds ('AmG'), both purchased by AmInvestment Management Sdn Bhd ('AmInvest') for the benefit of AmLife. The decision to purchase the senior bonds in this category was made by AmInvest; and

(b) the second category comprised: (a) RM5m senior bonds for AmLife's 'Life Par' fund; and (b) RM5m senior bonds for AmLife's 'Life Non Par' fund. In respect of the latter fund, ie the AmLife's 'Life Non Par' fund originally comprised of RM10m senior bonds, of which RM5m

matured in August 2009 and was accordingly redeemed by Aldwich. The decision to purchase the senior bonds in this category was made by AmLife.

[264] According to Goh Wee Peng (PW7), the RM3m senior bonds were purchased on 5 September 2003. As the credit analyst then, Goh Wee Peng testified:

(a) the IM (or the preliminary IM as the case may be) is the primary document relied by AmInvest in their initial credit evaluation as it contains most if not all of the information of the factors which she considered in her initial credit analysis of a bond issuance are (Q&A 8 WSPW7):

(i) the industry, business and financial standing of the bond issuer company;

(ii) the bond structure and in particular, the features that protect investors' interests, such as the positive, negative and financial covenants of the issuer company ... any 'ring-fencing' of the issuer's revenues and contract proceeds towards redemption of the bonds; security provided by the issuer; cashflow projections and certifications thereof by independent auditors/accountants, and requirements for independent external auditors to continuously assess the issuer company's ability to repay the bonds;

(iii) the ratings given to the bonds or the issuer company by any ratings reports published by ratings agencies;

(iv) identity and reputation of the lead arranger and trustee, and whether they are backed by reputable financial institutions.

(b) from AmInvest's Fund Management Division Credit Review dated 28 April 2003 (B9/2040), in recommending the senior bonds to AmInvest, she took into account (Q&A 12 WSPW7):

(i) Aldwich's cashflows appeared to be adequate to repay the interest and principal on the Bonds as there were 2 long-term contracts for 10 year periods for Aldwich's 2 core businesses of catalyst recovery and waste oil recovery. It also appeared that Aldwich would enjoy assured and stable cash flow streams over this period, ensuring some predictability in its revenues;

(ii) From the Preliminary Information Memorandum, Aldwich appeared to be the only operator, and thus have a regulated monopoly in its 3 businesses of tank cleaning, catalyst recovery and waste oil recovery;

(iii) AMINVEST also carried out its own sensitivity analysis based on the data contained in the Cashflow Projections as contained in the Preliminary Information Memorandum;

(iv) AMINVEST's assessment of the financial risk associated with Aldwich

based on the Preliminary Information Memorandum showed that Aldwich's cashflow was adequate to ensure that Aldwich could continue to maintain an average Debt Service Cover Ratio *('DSCR')* of 1.33 times in the worst case scenario, meaning that Aldwich would have sufficient money to service its Bond repayments. In any event, it was one of the Principal Terms and Conditions of the bond issuance that Aldwich was to maintain a DSCR of 1.5 times at all times, and that Ernst & Young *('EY')* was to certify on an annual basis that Aldwich complied with this term;

(v) AMINVEST's funds management division credit review also expressly states that its ratings reflected, amongst others, the 'tight underlying issue structure' of the Aldwich Bonds.

[265] Philomena Jan (PW1) is the credit analyst who evaluated and participated in the purchase of the RM15m senior bonds and which bonds were purchased on 24 September 2003. I find her considerations are similar to that of Goh Wee Peng (Q&A 7 and 13 WSPW1). When cross-examined, Philomena Jan disagreed with the suggestion by counsel for Aseam and Mayban Trustees that other factors which she held to be equally important as RAM ratings and cash flow projections, namely, the structure, the designated accounts, the assignments and the identity of the lead arranger which though found in the IM 'are not factors that would have carried that much weight as opposed to RAM ratings and cash flow projections'.

[266] Counsel for Aseam and Mayban Trustees in submission said the oral evidence of Goh Wee Peng was inconsistent with her credit analysis papers adding that changes of data contained in the IM did not appear to have any impact on the evaluation process (paras 210–211 of fourth and fifth defendants' opening submission). With respect I disagree. I find Aseam and Mayban Trustees omitted to reproduce in their submission, the evidence of Goh Wee Peng under cross-examination when she clarified the reason for the alleged inconsistency being the credit analysis papers for 2003 and 2005 were at a draft stage and that the final credit review papers may have differed from the draft as it would have been subject to amendments and approval after being presented to her research head. Some excerpts from Goh Wee Peng's evidence are:

... That's why all is without signature and what we can do best then is we actually print out all the shared folder copy from individual PC to submit the document and while, *when I actually reviewing it before the trial, I realised that especially the 2003 and 2005 My Lady, is actually a working copy*.

...

The date is 28th April 2003 [B9/2040–2043 at p 2040].

GOH It should be the date that I actually start working on the credit and that at that juncture I should only have the actual prelim IM with

me and subsequently presale report which is the draft rating rationale only issued in May and I usually for credit review we would take about 2 to 3 weeks to actually complete. *So therefore this is only a working copy. It is not complete, that's what best we can recover from our shared folder*.

GOH My Lady I do not think so there will be a very significant difference *but there will be some differences because it is still incomplete*. (Emphasis added.)

(NOP2/Day 7/pp 46–50/lines 17–37.)

I am mindful of the principle in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 234A–F right column cited by counsel for Aseam and MTB as follows:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, *particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings*. (Emphasis added.)

I find Goh Wee Peng has accounted for the statements in his documents and writings (ie the credit analysis paper 2003) when viewed in the light of the material evidence that the draft analysis of May 2003 is but a 'working copy' and 'It's not a final copy'. Thus I am not persuaded by Aseam and Mayban Trustees' submission 'it would be safer to refer to and rely on the contemporaneous draft analysis of May 2003 in determining the considerations actually taken into account by AmInvest in recommending the Senior Bonds for inclusion in AmInvest's list [non-operating risk, the operating risk and financial risk, essentially a business and financial assessment] as opposed to PW7's subsequently recollection of the considerations.

[267] Counsel for Aseam and Mayban Trustees seeks to discredit Philomena Jan's evidence arguing that her evidence in chief is 'very similar when questioned on the considerations allegedly taken into account in deciding on the purchase of the Senior Bonds' and she 'attempted to overcome AmLife's lack of documentation by relying on AmInvest's draft credit analysis instead'. In not accepting this argument, I adopt what I have stated in para 266 above.

[268] In the case of the *second plaintiff, AmNominees*, Goh Wee Peng of AmInvest gave evidence that AmInvest had on 5 September 2003 purchased RM100m senior bonds, of which RM28m had been redeemed and RM12m had been traded, thus leaving the remaining bonds:

(a) RM5m senior bonds in the name of AmTrustee Sdn Bhd, the first plaintiff, in respect of a fund managed by AmInvest;

(b) RM54m senior bonds in the name of AmNominees (Tempatan) Sdn Bhd on behalf of fund managed by AmInvest; and

(c) RM1m senior bonds in the name of HSBC (M) Trustee Bhd on behalf of a fund managed by AmInvest. Counsel for Aseam and Mayban Trustees contends that evidence led by Goh Wee Peng on AmInvest's purchase of RM5m senior bonds in the name of AmTrustee was not corroborated by Philomena Jan in her evidence. I agree with the plaintiffs' submission there is no relevance in this submission as both do not represent AmTrustee but made separate and distinct purchases of the Aldwich bonds: the evidence led by Philomena Jan at trial was in respect of the considerations *AmLife* took into account as fund manager when purchasing RM10m of the Aldwich Senior Bonds held in the name of AmTrustee whilst, Goh Wee Peng gave evidence in her capacity as fund manager on the considerations AmInvest took into account when purchasing RM5m of the Aldwich senior bonds for AmTrustee.

[269] In respect of the *third plaintiff, CIMB Bank Bhd*, the RM45m senior bonds may be divided into the following categories:

(a) the first category of RM35m senior bonds purchased by the third plaintiff's team led by Andrew Leong (PW8) and were purchased in and around March 2006; and

(b) the second category of RM10m senior bonds as custodian for the bonds managed by CIMB Principal Asset Management Bhd ('CIMB Principal') as investment manager for its clients. This category of senior bonds were purchased by the CIMB Principal (formerly known as Southern Bank Bhd Asset Management) team then led by Abdul Razak bin Ahmad (PW3).

[270] Andrew Leong's evidence-in-chief of reliance on the IM in purchasing the Aldwich bonds appears at Q&A 8 and 18 WSPW8:

(I) RAM had assigned a rating of 'AAA' to the Class A portion of the Bonds, which were the Bonds being marketed;

(II) the issue structure of the Bonds ('Issue Structure') ie:

(a) the requirement that Aldwich open the [6] designated bank accounts as stated in the Preliminary Information Memorandum ('Designated Accounts');

(b) The mode of operation of the 6 Designated Accounts;

(c) The 'ring-fencing' of Aldwich's Cashflow Proceeds. It is a term of the Preliminary Information Memorandum that the Revenue Acount, Construction Account, Construction Reserve Account, Escrow Account and DSRA (the DSRA is where monies earmarked for Aldwich's repayment of the Bonds were to be maintained) were to be operated solely

A by the security agent MIBB, with a bank to be nominated by MIBB in consultation with the issuer, Aldwich was to only operate 1 Designated Account; the Disbursement Account, into which MIBB would credit monies to allow Aldwich to operate its business;

B (d) the requirement in the Preliminary Information Memorandum that the 6 Designated Accounts had been established and notices of assignment and acknowledgement thereof had been received before any Bond monies were disbursed (CP14);

C (e) the requirement in the Preliminary Information Memorandum that evidence of the consent, where relevant, from the respective counter-parties of the contracts to be assigned to MIBB, and that notices of such assignment had been served and the acknowledgement by the said counterparties that such notices had been duly received (CP20);

D (f) the issue structure whereby the RM293 million of Senior Bonds ranked in priority to RM584 million of Junior Notes;

(III) the Cashflow Projections for Aldwich from 2003 to 2018, that is, the entire tenure of the Bonds;

E (IV) further, it was one of the Principal Terms and Conditions of the bond issuance that Aldwich was to maintain a 'Debt Service Cover Ratio' ('DSCR') of 1.5 times at all times. This would ensure that Aldwich had sufficient funds to redeem the Bonds upon their maturity. It was also a term of the Preliminary Information Memorandum that EY was to certify on an annual basis that Aldwich had in fact complied with this obligation;

F (V) *(sic)* Ernst & Young's valuation of the business within the valuation range of RM308.7 million for the lower case scenario and RM381.5 million for the upper case scenario;

(VI) Mayban Trustee, was the appointed trustee to protect the interests of the bondholders;

G (VII) Similarly, MIBB, who was the principal advisor, lead arranger, facility agent, security agent, project agent, primary subscriber and one of the financiers for the issuance of the Bonds, also enjoyed a good reputation in the Malaysian bond industry.

H **[271]** I find there is really no basis for this court to invoke an adverse inference against Andrew Leong for failure to produce credit valuation papers as urged upon the court by Aseam and Mayban Trustees. The reason being under cross-examination by counsel for Aseam and Mayban Trustees on the decision making process on the review of the Aldwich bonds, Andrew Leong explained

I that no such credit evaluation documentation is generated when purchasing bonds (NOP3/Day10/pp 39–40/lines 33–18).

Notwithstanding Andrew Leong's review of the Aldwich senior bonds was not in writing, I find his testimony of reliance on the IM remains steadfast. In fact

when cross-examined by counsel for EY that his testimony was 'purely based on his recollection of what you and your team took into account some 8 years ago', Andrew Leong replied:

> ADR I disagree with that argument, My Lady, because this approach is a consistent approach that we have applied throughout the years for all the other bonds that we purchased and we also take comfort that RAM in its rating announcements and rating reports indicate that they also look at similar items as we do. So we take comfort that we are not off the track.
>
> ADR Well My Lady, as I mentioned we apply the same rigour and the same methodology if you like.
>
> (NOP3/Day 11/pp 129–130/lines 14–3.)

[272] As to the purchase of six lots of Aldwich senior bonds for the benefit of EPF by Abdul Razak (PW3) of CIMB Principal, Aseam and Mayban Trustees took on the issue that the bondholders are not the parties who suffered the loss. I shall deal with this point later.

[273] In respect of the *fourth plaintiff, RHB*, Abdul Razak, who had left CIMB Principal for RHB in April 2005, purchased the senior bonds. I find that Abdul Razak during cross-examination by counsel for Aseam and Mayban Trustees stood his ground on the importance of the IM notwithstanding that it was 18 months into the bonds programme and disagreed that the IM will carry less weight because of passage of time stating

> [T]he importance of the information memorandum is still relevant at the point of time because we must understand the nature of this programme. This is what I call a structured bond.
>
> ...
>
> Whereby the structure of the bond is very important because you are, the repayment of the bond actually comes from what I call the ring-fencing of each cash flow ... Issue structure.

He disagreed with the suggestion that the IM will carry less weight because of passage of time stating:

> I disagree on that basis. Because like I said, there are certain obligations on the structure.
>
> (NOP1/Day 4/pp 108–109/lines 7–28.)

He explained that 'issue structure' included not only ring fencing but also covenants (spells the duties) of the issuer, project agent, security agent, reporting accountant, the summary as set out in RHB's Corporate Debt Analysis dated 29 April 2005 at p 22 (bottom figure) of D20/20–24 or B9/2060–2064.

(NOP1/Day 4/pp 118–119/lines 30–23.)

[274] In respect of *HSBC, the fifth plaintiff*, the RM6m senior bonds comprised two categories: RM1m senior bonds purchased for a fund managed by AmInvest and RM5m senior bonds purchased for 'RHB Bond Fund', a unit trust fund managed and administered by RHB Investment.

[275] I adopt what I have alluded at paras 264 and 266 above with regard to the considerations taken by Goh Wee Peng in relation to the purchase of the RM1m worth of the senior bonds.

[276] In respect of the *sixth plaintiff, UniAsia*, Ho Teck Seng (PW6) testified UniAsia purchased in two tranches: (i) RM5m senior bonds in June 2003, prior to issuance of the bonds, on a 'when issue basis' and followed by (ii) RM5m senior bonds on 29 August 2005.

[277] In respect of the first tranche, Ho Teck Seng testified that for the purposes of evaluating the bonds, he studied the preliminary IM and prepared a paper 'Proposal to Acquire the Bonds' (UniAsia's Credit Analysis) (B9/2071–2074 or D20/Tab 3/54–57) and then subsequently received the RAM presale report of May 2003 (B1/5–28 or D20/122–129). Counsel for Aseam and Mayban Trustees submits 'It would appear that PW6's recommendation to purchase this Bonds was primarily motivated by the strong AAA rating' ('first limb') and 'It would appear that most of the data relied upon was derived from the RAM pre-sales report, as opposed to the Preliminary information Memorandum.' ('second limb'). With respect I cannot agree with the submission on the second limb as I find when cross-examined at length by counsel for Aseam and Mayban Trustees, including his answer (iv) (p 21 to Q13 WSPW6) of 'long term and back to back contracts with PETRONAS were an added security in ensuring a stable future cash inflow of the business, which in turn would have enabled the repayment in bonds', Ho Teck Seng in fact stated he relied on both the RAM presale report and the IM and to the suggestion, that he relied more on the RAM presale report, his response was:

> HO Yes, you can put that, but as far as I am concerned, is that, we read both the documents.

I find Ho Teck Seng explained why:

> HO Yes. But the, but it is quite normal for RAM Reports to contain the gist, the important factors. So it would have seemed that the most of it is from the RAM Report.
>
> RL Most of it?

HO Yes, basically RAM Report tried to summarize what are the factors, key factors, they take into consideration in coming out with AAA. However, certain regulatory requirement, they did not put it in.

...

HO Ok. RAM reports contain the, the important factors, when RAM come out with the rating. For, Information Memorandum, as required by SC, there are certain basic information must be there. Those is like regulatory. So it may not be in the RAM Report, but is in the IM. You know, who is the accountant, who is the what.

(NOP2/Day 6/pp 69–70/lines 14–29.)

[278] In so far as the second tranche of purchase by UniAsia is concerned, in essence counsel for Aseam and MTB submits:

> Due to the difference in the timing of the purchase of the first tranche and the second tranche respectively, the considerations allegedly taken into account in deciding on the respective purchases obviously cannot be identical despite the evidence in chief of PW6 to the contrary', the 'IM would obviously not have been as significant as it was made out to be' and 'by this time, Aldwich had made two redemptions of the Bonds in August 2004 and August 2005 respectively and this must have assured the 6th Plaintiff of Aldwich's ability to repay'.

With respect I am of the view these are mere opinions and inferences drawn by Aseam and Mayban Trustees as I find there is not much cross-examination (NOP2/Day 6/p 77) on the recommendation of purchase of the second tranche contained in 'PW6's memorandum of 26 August 2005' or 'UniAsia's Aldwich credit review paper dated 30 August 2005' (B9/2075–2077).

[279] A common feature in the submission of counsel for Aseam and MTB is the factor of 'strong AAA rating' as seen in the submissions on the first limb of Ho Teck Seng's '*recommendation to purchase* [RM5 million Senior Bonds held by UniAsia] *was primarily motivated by the strong AAA rating*' and HSBC's decision to purchase through Abdul Razak the second category of RM5m senior bonds held by HSBC and managed and administered by RHB Investment was 'primarily influenced by the strong AAA rating assigned by RAM and the 'good relative value' of the Bonds at the time of purchase' (see also para 265 above vis a vis Philomena Jan).

[280] In addition to what I have stated in paras 261–278 above, having assessed the evidence of Abdul Razak, Ho Teck Seng, Goh Wee Peng, Philomena Jan and Andrew Leong, in my considered view the following matters can be gleaned: (a) although the AAA rating assigned to the senior bonds by RAM was a consideration to the bondholders when purchasing the Aldwich bonds, it was not the only consideration. Hence nothing turns on the bondholders' reliance on the RAM ratings. Touching on his credit analysis as

A contained in RHB Corporate Debt Current Analysis (B9/2060–2064), when counsel for Aseam and MTB suggested to him, '[I]n the scheme of things, it is the rating that is the, of paramount importance', Abdul Razak's consistent stand in cross-examination was:

B > *Yes, it's one. Like I mentioned it's one of the factors, yes*. Of course the rating is important because that's what the client set out to, as a condition whether we can buy or not.
>
> (NOP1/Day 4/pp 154–155/lines 11–1.)
>
> (Emphasis added.)

C I find what is apparent is that the AAA rating by RAM can only be attributed to the tight and strong structural features of the bond as described in the terms of the IM. This point is brought home when Abdul Razak in re-examination clarified that the ratings of AAA also took into account similar things that he
D took into account:

RZK Yes because you must understand the, when the government want to develop the bond market one of the prerequisites of a developed bond market is to have a rating agency so-called to provide independent — because last time when, before the bond market
E consists only of government securities which everybody take it as a sovereign risk; so there is no requirement for a rating agency. *So after the Asia financial crisis the government want to broaden the bond market, they give few licences so in Malaysia there are Rating Agency of Malaysia (RAM) and Malaysia Rating Corporation (MARC). However the financier still has to do their own evaluation of the credit. So that's why if you noticed in this case when we looked at the transaction it's similar like what the rating agency also looked, but apart from the business consideration, we also have to look at the so-called structure of the transaction because if not there's no way that for example*
F *Aldwich could get a AAA without that structure support*. That's why if
G you look at the RAM rating they issued.

...

RZK *So that's why even RAM says it's a structured rating for a structured transaction so that's why it's important for everybody that's involved in*
H *the structured transaction to know what they are doing. Technically as a fund manager we think all these should be handled by the lead arranger that, you know, that's why the party is between, on the structure and everything is between the lead arranger, the security agent with the trustees so we are supposed to only trade on the bond*. That is our main.
I

YA Fund manager? 'We' is?

RZK Meaning the fund management industry.

YA Just trade.

RZK Yes, if not, if people do not have - that's why SC impose a high level of duty for those promoters that want to submit to them on issuance of capital market securities, both in the fixed income and the equity markets.

YA Ok.

AGZ Sorry, just to clarify, when you say 'structured' could you please explain what you mean when you say 'structured'?

RZK *Ok this is considered a structured bond because this is issued by SPV so there is an expectation as set out in the Info Memo on how the transaction, meaning there is, there must be a proper ring-fencing of the transaction, of the revenue, proper distribution you know the certification of the covenants, things like that, that was put in place to mitigate all the risks that's faced in the issuance.* (Emphasis added.)

(NOP2/Day 5/pp 41–44/lines 27–31.)

Similarly, counsel for EY cross-examined Ho Teck Seng on 'the fact that you put AAA rating first in your list was because that was the most important consideration, right?' (Q&A 13 WSPW6), he replied:

HO Yes, because in the AAA rating it consists of a lot of factors, so we relied on the professional judgement of RAM rating agency in Malaysia.

(NOP2/Day 6/p 103/lines 6–8.)

Ho Teck Seng explained in re-examination the matters considered by RAM which he relied on as follows:

AGZ Now to your knowledge what are these matters that which are considered by RAM which you rely on?

HO *The strength of the business, meaning to say that certainty of the future stream of income, the structures of the repayment whether it is positive covenants, negative covenants; and also the, how do you utilise the money. In the investment term we use two words, first of all is 'ring fencing' meaning to say after the operator obtained the cash from the sales proceed they cannot use the money as and when they wish. They must be ring fenced, put it into designated account, that is No 1. And each of the account must have a specific purpose. No 2, the second word is 'waterfall'. 'Waterfall' meaning to say how to utilise the money — the top priority followed by secondary priority and third priority. Normally in such bond, top priority of course is to pay the tax to the government. Second, is to pay their so-called daily operations expenses. In such paper normally there is a limit, for example, before the start of the year, you must have a budget, the budget must be approved by the reporting Accountant or the Auditor and then you can utilise the money, with certain leeway, meaning to say that, plus and minus 10%, 20%. Then the rest of the money will go towards building up to repay the loan. It is very common and it is not just restricted to Aldwich paper. It is very*

common for the Bond industry; the ring fencing of the money and also the waterfall structure in order for RAM to give you a good rating. (Emphasis added.)

(NOP2/Day 7/p 18/lines 2–25.)

Likewise, when cross-examined by counsel for EY as to whether AAA RAM rating was important and whether she relied on it, Goh Wee Peng answered, '… it's part of my consideration'. Thereafter she explained the relevance of the RAM pre-sale report and the RAM ratings to the structure, as follows:

AGZ Now what is the relevance of the RAM pre-sale, the RAM rating to the structure?

GOH My Lady, *from the RAM reports it actually did highlight that the AAA rating that being assigned to the issuer is actually based on the structure, the tight structure that has been actually drafted in the term and condition ie.*

YA Sorry, it's based on the what?

GOH It's based on the tight structure that actually, that have been drafted in the term and condition in the IM, where it actually stated that *for example revenue account will be ring-fenced and all the designated account will be ring-fenced in accordance to the priority of payment and that actually assured perhaps, assured, sorry, that assured rating agency that the cash flow will be properly capture for the repayment of the bonds in future. Hence and not only that to add on, there's also a stringent monitoring process by the external auditor to actually certify the DSCR at 1.5 times at all times and or else it will be actually treated as a trigger event. I think all this tight underlying structure and of course the monitoring by the facility agent and also trustee is part of the comfort and support to the rating agency as well to actually grant them a AAA rating. So it's actually not very different from how bond holder look at the structure of the bonds, it's how important and pertinent we look into Aldwich's issuance which is actually the structure and also the comfort of the certification from the external auditor.* (Emphasis added.)

(NOP2/Day 8/p 107/lines 9–35.)

In so far as Andrew Leong's response with regard to his reliance on the AAA RAM rating, I shall adopt what I have stated in paras 270–271 above.

(a) As for the cashflow projections, I observe that it was one of the critical factors taken into account by the bondholders in their credit evaluation of the Aldwich bonds. In my view nothing turns on such reliance given that the cashflow projections itself formed part of the IM (see paras 261–266 above).

BONDHOLDERS NOT PARTIES WHO SUFFERED THE LOSS

[281] Under this head of argument, basically the complaints are in respect of the:

(a) RM5m senior bonds referred in per para 268(a) above, the investment was for Tenaga Retirement Fund, the actual owner;

(b) RM54m senior bonds referred in para 268(b) above, the investment was for the funds of EPF, Malaysian Timber Council, Perkeso, Yayasan Tun Razak AmAssurance etc; and

(c) RM1m senior bonds referred in para 268(c) above, the investment was for AmConservative Fund.

[282] Counsel for Aseam and Mayban Trustees submits as the first (AmTrustee), second (AmNominees), third (CIMB) and fifth plaintiffs' (HSBC) role is that of custodian of the funds it each respectively manages, they are not the party who suffers the loss and are not the appropriate parties entitled to benefit from any recovery arising from such loss. In my respectful view the aforesaid submission cannot be sustained. I find AmTrustee, AmNominees, CIMB and HSBC are in fact, the parties who suffered the loss and are entitled to benefit from any recovery arising from such loss for the following reasons.

[283] Firstly, I disregard the submission of Aseam and Mayban Trustees vis a vis AmTrustee, AmNominees and HSBC on the ground that it is not a pleaded issue. I rely on *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293 (FC) at p 301 para [13] and p 302 paras [14]–[16].

[284] Secondly, in any event I find there is evidence before the court that EPF was joined as the sevent plaintiff to this suit after Aseam filed its further re-amended defence and Mayban Trustees, its re-amended defence to include a plea that the plaintiffs did not suffer any loss in respect of the bonds purchased on behalf of EPF. Although EPF was joined as a party to this suit, the plaintiffs have maintained throughout the trial that the first to sixth plaintiffs, as the registered bondholders of the Aldwich bonds, are the rightful and proper parties to commence this suit. This is supported by the unchallenged evidence-in-chief of PW9, Ja'afar Rihan (Q&A 17 WSPW9) who testified on behalf of EPF that:

> EPF was joined as the 7th Plaintiff to this Suit on 17-9-2014 upon the advice of the Plaintiffs' solicitors [and]
>
> *... If the Bondholders were to succeed in their claim following trial, as a matter of fact, the appropriate portion of the judgment sum as may be awarded by this* Honourable *Court and paid by the Defendants would in turn be paid to the funds maintained by the 2nd and 3rd Plaintiffs. Dividends may subsequently be declared on those funds and paid to EPF. Those monies would then be pooled together with EPF's other investment funds, and declared as dividends and paid out to EPF's members*. Hence, it is material to note that *EPF has approximately 14 million members. Therefore, the ultimate beneficiaries of any judgment* of this Honourable Court *in favour of those portions of the 2nd and*

3rd Plaintiffs' investments on behalf of EPF, would be the 14 million members of EPF. (Emphasis added.)

In this regard I am of the view it would be absurd and impractical to join all of EPF's 13.95 million members as plaintiffs, as Aseam and Mayban Trustees suggests.

[285] I find the procedure involved in the purchase of bonds by the external fund managers as described by Ja'afar Rihan lends credence that the custodian companies as the legal owners of the bonds are the rightful and proper parties to commence this suit. The procedure is as follows in Q&A 15 WSPW9:

(a) payments for the purchase of bonds and proceeds from the sale of the bonds are made by the custodian company and remitted to an account that the custodian company maintains with Bank Negara;

(b) 'Once decision is made by external fund managers to purchase fixed income instruments such as bonds, *the purchase price is paid out by a trustee or custodian company who becomes the registered bondholder. Once payment is made, the bond is registered in the name of the custodian company as the legal owner of the bond*';

(c) '*When a decision to sell the bonds is made by our external fund managers, the net proceeds of the sale will be paid to the custodian company as the legal owner of the bond. Therefore, any profit or loss arising from the investment of bonds is incurred by the fund maintained by the custodian company*'; and

(d) '*[Dividends] are added to the pool of funds from EPF's various other investments, which are then subsequently declared as dividends before being paid into the accounts of EPF's approximately 14 million members at present*'.

LIMITATION

[286] Aseam and Mayban Trustees submit any breaches by Aseam and/or Mayban Trustees as against the seventh plaintiff, EPF which occurred prior to 17 September 2008 is barred by reason of limitation pursuant to s 6 of the Limitation Act 1953. In my judgment Aseam and Mayban Trustees' contention is without merit for these reasons:

(a) I adopt the proposition of law propounded by the Court of Appeal in *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors* [2009] 2 MLJ 765 where at pp 767–768 the Court of Appeal held:

> On the allegation that the joinder of the third plaintiff was barred by limitation, the powers of the court under O 20 r 5 read together with O 15 r 6 of the RHC include the power to give leave to add a party even after the expiry

of any relevant period of limitation. Also by virtue of the doctrine of relation back, the law treats the 'new' party ie the third plaintiff in the instant case, as being a party who had been a party from the date of the issue of the writ and that would be well within any period of limitation.

(Per Justice Abdul Malik Ishak at p 804 paras [100]–[101]). On the basis of the Court of Appeal decision, I am of the view that limitation does not apply to bar recovery by EPF for breaches which occurred prior to 17 September 2008; and

(b) I adopt what I have alluded in paras 284–285 above. Since I have found that plaintiffs have succeeded in their claim against the defendants, any recovery by EPF to that portion of the judgment sum as awarded by the court should be paid to the custodian company, viz, AmNominees and CIMB on its behalf, against whom limitation has no application.

SOPHISTICATED INVESTOR AND IMPORTANT NOTICE

[287] I have dealt earlier with the evidence wherein I conclude that the bondholders place reliance on the IM. I have mentioned in paras 32 and 38 above when SC granted Aseam/Aldwich approval for the bonds to be issued by Aldwich, SC imposed, amongst others, a condition that Aseam was required to obtain SC's prior approval for any subsequent amendments to the terms and conditions for the issuance of the Aldwich bonds. The important notice which was found in the IM was not part of the submission application to SC which meant that SC did not approve it and neither Aseam nor Aldwich submit the important notice subsequently for approval. It is in these circumstances that I find the SC had no knowledge of the existence of the important notice. I disregard the submission of Aseam and Mayban Trustees that the SC 'must have been aware of the inclusion of the Important Notice to the Information Memorandum' as no witness from SC was called by Aseam or Mayban Trustees nor any evidence led on this matter.

[288] The important notice (B3/497–499) in the IM appears in small print runs in three pages and although the paragraphs are not numbered, it contains 13 paragraphs on diverse issues. The critical clause is in para 4 (the relevant part) is reproduced as follows:

> The Lead Arranger ... shall not be liable for any consequence of reliance on any of the information or data in this Information Memorandum.

[289] I have alluded to the position taken by Aseam and Mayban Trustees on the important notice point in para 203 above. Apart from that, Aseam and Mayban Trustees submit:

> Whether the IM is a contract or agreement, within the meaning of *Section 65 of SC Act* (which has since been replaced by section 256 of CMSA), or whether the

A Important Notice is an exclusion clause, are irrelevant.

The recent amendment to *section 256 of CMSA* (pari materia with *section 65 of SC Act*) pursuant to the Capital Markets and Services (Amendment) Act, 2015 prohibiting inclusion of exclusion or restriction of liability clauses came into force on 15th September 2015 does *not* have retrospective effect and as such, is not B applicable. The amendment clearly signifies that there was no prohibition against inclusion of exclusion or restriction of liability clauses prior to 15th September 2015 hence the necessity to introduce the amendment.

C **[290]** Whilst I agree that the amendment to s 256 of the CMSA (replacing s 65 of the SC Act) has no retrospective effect, with respect I do not agree with the rest of the aforesaid submission of Aseam and MTB. Section 65 of the SC Act provides as follows:

65 Agreements to exclude or restrict liability void

D *An agreement is void* insofar as it purports to exclude or restrict the liability of a person for contravention of section 55, 57 or 58 or for loss or damage under section 153.

On appeal from the decision of the CA which dismissed KAF (lead arranger) E on the disclaimer in the important notice (see p 375 paras [34]–[35]), the Federal Court found that KAF was free to include the important notice and rely on it to exclude liability, stating:

We agree with learned counsel for KAF that the word 'agreement' in s 65 of the SCA must be given its ordinary meaning, which would mean some kind of contract F between two or more parties. The IM on the face of it is not a contractual document. It had been issued by KAF on behalf of Pesaka to provide information to potential investors. The IM was not part of the Issue Documents which requires the approval of the SC. For those reasons, we hold that the IM is not an agreement falling within s 65 of SCA, therefore, KAF is free to include the Important Notice G in the IM to exclude any liability arising from any claim that may arise from the IM.

[291] It is my respectful view that the *Pesaka* (FC) judgment on the effect of the important notice is not relevant and is distinguishable for the reasons contained in the persuasive submission of the plaintiffs summarised below and H with which I am incline to agree:

(a) the Federal Court however did not go on to state how the parties were bound by the disclaimer in the important notice if the IM was not an agreement/contract and that the reasoning of the Federal Court I disregarded or omitted two fundamental principles relating to exclusion clauses:

(i) an exclusion clause can only be effective if it is incorporated into a contract. Absent a contract, it is not binding; such clauses do not exist in a vacuum but they are consensual in nature; and

(ii) an exclusion clause is to be construed strictly against the party which is relying on it. It cannot exclude liability unless it is expressed in clear terms by reason of the 'contra proferentum' rule. The plaintiffs rely on the passages cited from (i) *Halsbury's Laws of England*, 5th Ed at para 391 p 356 and para 393 p 360; and (ii) *Chitty on Contracts*, 31st Ed, Vol 1 (2012) para 14-005 p 1014–5 and para 14-009 p 1018–9.

The plaintiffs further rely on two House of Lords' cases:

(A) *Scruttons v Midland Silicones Ltd* [1962] 1 All ER 1 relying on a passage from the judgment of Lord Reid at p 10C–E which established that the doctrine of privity of contract prevents a stranger from relying on provisions of a contract (including an exclusion clause) which he is not party to; and

(B) *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd; The Aliakmon* [1986] AC 785 at p 817E–H, relying on a passage from the judgment of Lord Brandon at p 817E–H wherein the House of Lords held that a stranger to a contract is not entitled to rely on an exclusion clause in such contract to qualify his duty of care;

(b) applying these settled principles of contractual exclusion clauses it would mean that if, on the one hand, the IM, which is the only document that contains the disclaimer of liability, is not an 'agreement' to which it was a party, Aseam cannot rely on it because it is not consensual between Aseam and the plaintiffs. If, on the other hand, the IM containing the said important notice is an 'Aseam agreement', then by virtue of s 65 of the SC Act and/or s 256 of the CMSA it is void. In either situation, the *Pesaka* (FC) judgment is with respect not relevant.

In fact the plaintiff's submission on the effect of exclusion clauses in the IM on the *Pesaka* (FC) judgment is echoed by Prof Dr Zuhairah Ariff bt Abd Ghadas in the recent 2017 publication of the book *'Justice Above All', Selected Judgments of Tun Arifin bin Zakaria, With Commentaries*. The learned commentator in an insightful manner stated:

> It is interesting that the exclusion clauses inserted by KAF in the IM were held to be enforceable and binding upon the bondholders. By deciding that the exclusion clauses in the IM excluded liabilities of KAF against the bondholders, the court was actually construing the IM as a contract between KAF and the bondholders. This is because one of the conditions for a valid exclusion clause is that a person wishing to rely on the exclusion clause must show that it forms part of the contract. This principle is derived from a fundamental contract law principle — the doctrine of privity of contract. In *Scruttons v Midland Silicones* [1962] AC 446, the court held that a person who is not a party to a contract is not protected by an exclusion clause in that contract, even if the clause purported to extend to him (p 340 para 10.24).

The learned commentator thereafter posed an extremely pertinent and penetrating query:

> The question arising out of this decision is this: if the IM is construed as a contract document but it does not fall within the scope of s 65 of the SCA, should there be certain monitoring mechanisms or provisions under the SCA so that the IM is not used loosely by certain parties to exclude liabilities, particularly in financing projects? (p 340 para 10.25).

I believe the learned commentator's concern for 'provisions under the SCA' is taken care of in s 256 of the CMSA.

[292] Section 256 of the CMSA reads:

> 256 Any *provision, clause or term* contained in any *agreement, contract, document or prospectus that* is given or provided to an investor in relation to or concerning —
>
> (a) an offer for subscription or purchase of securities;
>
> (b) an invitation to subscribe for or purchase securities;
>
> (c) the making available of securities,
>
> that *purports to exclude or restrict the liability of a person* for contravention of section 92A, 246, 248 or 249 or for loss or damage under section 357 shall be void.

[293] The plaintiffs argue Parliament amended s 256 of the CMSA (s 65 of the SCA) to widen the word 'agreement' to any document or contract that seeks to exclude liability from the accuracy and reliability of information in such document: such an attempt would be deemed as void and ineffective. The amendment became necessary following the *Pesaka* (FC) judgment and urge the court to take into account Parliament's intention. I find there is force in the plaintiffs' argument of the legislative intent of s 256 of the CMSA which in my view is fortified by the emboldened acknowledgment made by Aseam and MTB that:

> The amendment clearly signifies that there was no prohibition against inclusion of exclusion or restriction of liability clauses prior to 15th September 2015 *hence the necessity to introduce the amendment*.

[294] Aseam and MTB further submit 'The Plaintiffs are 'sophisticated investors' [falling within one or more of the categories of persons within Schedules 2 and 5 or Schedules 3 and 5 of the SCA] with substantial expertise and resources in such a PDS scheme and are expected and able to undertake their own independent evaluation and analysis and professional advice [and] the Plaintiffs' witnesses who testified on their respective purchasers, ie PW1, PW3, PW6, PW7 and PW8, conducted their own evaluation of the Bonds prior to the purchase'. To support their argument, Aseam and MTB rely on the *Pesaka* (FC) judgment, p 192 paras [49]–[50] and referred to the case of *JP Morgan Chase Bank and others v Springwell Navigation Corp* [2008] All ER (D)

167 (Jun) wherein the Federal Court at p 192 para [51] stated:

> [51] The important notice in the present case clearly states:
>
> ... by receiving this Information Memorandum, the recipient acknowledges that it will be solely responsible for making its own investigations, including the costs and expenses incurred, and forming its own views as to the condition and prospects of (Pesaka) and the accuracy and completeness of the statements contained in this Information Memorandum.
>
> This undoubtedly shifted the burden of verifying the content of the IM on the potential investors rather than KAF.

[295] With respect I find the submission of Aseam and Mayban Trustees on the 'sophisticated investor' argument is misplaced for the succinct reasons given by the plaintiffs.

[296] The term 'sophisticated investor' is not defined in the SC Act. However, the market and SC in its guidelines recognises the following categories of investors as set out in Items 9, 10 and 11 of Schedules 2 and 3 of the SC Act, as 'sophisticated investors':

(a) a person who acquires securities pursuant to an offer, as principal, and the aggregate consideration for the acquisition is not less than RM250,000 or its equivalent in foreign currencies for each transaction whether such amount is paid for in cash or otherwise (not relevant);

(b) an individual whose total net personal assets exceed RM3m or its equivalent in foreign currencies; or

(c) a corporation (including an offshore company as defined under the Offshore Companies Act 1990) with total net assets exceeding RM10m, or its equivalent in foreign currencies, based on the last audited accounts.

[297] Bonds issued to these 'sophisticated investors' in the abovementioned three categories are referred to as 'excluded offers and invitations' and/or 'excluded issues' pursuant to ss 38 and 39 of the SC Act whilst issuances to the man on the street and the world at large are referred to as an 'issue'. When an offering of securities is made to the man on the street vide an 'issue', the offering must be accompanied with a registered prospectus. Division 3 of the SC Act deals with the requirement for the filing and registration of a prospectus, that is, the primary document in an issue, with the SC, and restrictions on advertising of that prospectus. However such procedural requirements are not required for an offering of securities to 'sophisticated investors' through an 'excluded issue' because the SC treats this category of purchasers as having the exposure and requisite risk appetite to invest in complex and risky capital market investment products.

[298] I agree with the plaintiff's submission that *all bond offerings*, whether they are an 'excluded issue' to a 'sophisticated investor' *or* an 'issue' to the man on the street, *bear prospectus liability*. That means that liability of any person for false and/or misleading statements or statements for which there are material omissions pursuant to s 57 of the SC Act, applies across the board irrespective of the nature of the investor. In other words the said sentence does not exclude liability for causing damage or loss by reason of Aseam making false or misleading statements or information or submitting such statements or information from which there is a material omission. Hence the 'sophisticated investor' argument is irrelevant to the determination of the defendants' liability.

[299] In any event with respect I am of the view that *JP Morgan Chase Bank*'s case can be distinguished:

(a) there is the evidence of the plaintiffs' witnesses that it is common practice and expectation in the industry that information contained in the IM be truthful (ss 38, 57 and 153 of the SC Act). They also expressed that the bond industry in Malaysia does not operate on the basis that potential bondholders have to undertake their own independent investigations and verification of the IM as it is not practical for them in terms of resources and expertise required;

(b) the verification of information in the IM is to be undertaken by parties responsible for the issuance of the bonds, inter alia, issuer, lead arranger, transactional solicitors, valuers and reporting accounts by the convening of the DDWG. The law placed the onus of verifying the information and data contained in the IM with the members of the DDWG. The planning memoranda of the DDWG corroborates this, which amongst others include:

> *The objective of a due diligence investigation is to:*
>
> (a) *ensure compliance with the provisions of the SCA*;
>
> (b) ensure on behalf of an applicant that the submission to the Securities Commission meets the legal standards governing it, that is that *it contains all the relevant material information* which is known to the applicant, its officers, the financial advisers, the experts and any other person involved in preparing the submission to the Securities Commission, or which can be discovered by any of them upon making reasonable enquiries; and
>
> (c) ensure on behalf of all persons involved in the preparation of the Info Memo that it meets the legal standards governing it, that is, that *it contains all the relevant material information* which is known to such persons, or which can be discovered by any of them upon making reasonable enquiries.

3.1.4 The DDWG must ultimately ensure that:

(i) *the Submission*, the CFE Info Sheet *and the Info Memo do not contain any statements or information which are false or misleading*;

(ii) there are *no material omissions* from the Submission, the CFE Info Sheet and the Info Memo.

3.2.1.The Issuer, their officers, their *advisers and the experts and any other person involved in the preparation and submission of the Submission, the CFE Info Sheet and the Info Memo* must at all times, adhere to the following broad principles of care and conduct in respect of the Inquiry:

(i) ...

(ii) *due skill, care and diligence must be given in providing any service or advice; and*

(iii) there should be *objectivity and independence in all professional and business judgements*.

3.2.3 Persons delegated the task of undertaking due diligence enquiries must therefore be competent and *have the necessary expertise to carry out the task properly*.

3.2.5 *Different levels of responsibility is expected of different persons in the submission of the Proposed Programme* which is in accordance with their role and expertise.

3.6 *Continuing Due Diligence*

The due diligence review is undertaken not only in respect of the Submission, the CFE Info Sheet and the *Info Memo but should be continued in the manner provided in this paragraph until the Proposed Programme has been fully implemented. In the event of discovery of material discrepancies or occurrence of change* of events *after* the Submission, the CFE Info Sheets and *the Info Memo* has been made and/or issued, *each DDWG member who becomes aware of the material discrepancy or change of event must report such findings to the Lead Arranger and the DDWG, for onward disclosure to the SC and/or other relevant authority failing which, the Issuer, the Board and the members of the DDWG may be deprived of the defences available to them*.

(c) Aldwich issued the IM to potential investors '... for the sole purpose of assisting them to decide whether to subscribe or purchase the Senior Bonds and/or Junior Notes'. I find the plaintiffs have adduced evidence that they trusted in the integrity of the information provided in the IM, and relied heavily on them to obtain an understanding of the structure of the Aldwich bonds and the present and future prospects of the business of the issuer. Further, reliance on the IM was critical as the issuer was a non-listed company and publicly available information on Aldwich was very scarce; and

(d) the market treats the IM as an official offer document and the SC deems it to carry prospectus liability. As such, information contained in the IM is expected to be true, complete and reliable. Parliament has pursuant to s 38 of the SC Act imposed a duty (which are subject to civil and penal consequences) on the key players in the issuance of bonds, including the principal advisor (Aseam) etc, to ensure that statements or information contained in the prospectus is not false or misleading, and that there are no material omissions in the prospectus. The lead arranger cannot, in these circumstances, disclaim liability. The recent amendment to s 256 of the CMSA clearly stipulates this as alluded in para 293 above.

[300] For all the reasons above, it is my respectful view that Aseam and Mayban Trustees cannot under these circumstances seek to exclude liability by relying on the important notice in the IM.

[301] In any event, assuming I err in my holding above, the exclusion clause (important notice) in the IM is only confined to Aseam qua lead arranger and not in its other capacities. Aseam's role as lead arranger came to an end when the bonds were released on 15 August 2003; thereafter Aseam assumed the role of security agent and the exclusion clause has no application and effect.

THE PLAINTIFFS' CLAIM AGAINST ERNST & YOUNG ('EY')

[302] The four roles played by EY in the Aldwich bond issuance are:

(a) the reporting accountant tasked with valuing AEM's business (comprising the existing CR and tank cleaning operations, and the WOR plant which was constructed using RM119m of the bond proceeds) ('valuer');

(b) the reporting accountant and member of the DDWG tasked with reviewing Aldwich's cashflow forecast and projections and to provide its opinion thereon as stipulated and included in the IM;

(c) the auditors of AEM (since its incorporation in 1995) and of Aldwich from 2003 ('auditor'); and

(d) certifying, on an annual basis, that Aldwich's DSCR actual and projected ratios were above the minimum of 1.5 times mandated in the IM ('confirmer').

[303] The plaintiffs' claim against EY in respect of breach of statutory duty are two fold:

(a) breach of statutory duty in relation to the actions and omissions of EY prior to the bond issue ie in respect of its contribution to the authorship of the IM, relying on ss 57, 38 and 153 of the SC Act; and

(b) breach of statutory duty in relation to the actions and omissions of EY in the 6 1/2 years that the bonds were traded ie EY's failure to report on the wrongdoings of Aldwich relying on s 85 of the SC Act.

[304] First, as a party who allowed information supplied by them to be included in the IM, s 38 of the SC Act places EY under a continuing duty to ensure that all such information is not false or misleading, or contains material omissions. Section 57 of the SC Act makes it an offence for EY to breach ss 38 and 153 imposes liability on EY for all loss or damage caused as a result of such breach of s 38.

[305] Secondly, as the auditor to a bond issuer, EY is subject to ss 85(1), (2) and (3) of the SC Act as reproduced:

> 85 Duty of auditor to trustee for debenture holders
>
> (1) An auditor of a borrower shall, within seven days after furnishing the borrower with any balance sheet, profit and loss account *or any report*, certificate or other document which he is required by the *Companies Act 1965* or by the debenture or trust deed *to give to the borrower, send a copy* of such balance sheet, profit and loss account, *report*, certificate or other document by post *to every trustee for the holders of debentures* of the borrower.
>
> (2) Where, *in the performance of his duties as auditor of a borrower*, the auditor *becomes aware* of any matter which, *in his professional opinion, is relevant to the exercise and performance of the powers and duties imposed on the trustee* —
>
> (a) *by this Act; or*
>
> (b) *under the trust deed*,
>
> *the auditor shall*, as soon as practicable after becoming aware of the matter, *report the matter to* the borrower and *the trustee*.
>
> (3) Where, *in the performance of his duties as auditor for the borrower*, the auditor *becomes aware* —
>
> (a) of any matter which, *in his professional opinion*, may constitute a contravention of any provision of this Act; or
>
> (b) of *any irregularities* that may have a *material effect* on the ability of the borrower to repay any amount under the debenture
>
> the auditor shall immediately report the matter to the Commission. (Emphasis added.)

(Note: repealed in September 2007 and replaced by s 276 of the CMSA, the provisions of which are substantially similar.)

[306] There is a difference of opinion between the plaintiffs and EY as to the interpretation to be accorded to s 85 of the SC Act. EY takes the position that under s 85 'a duty to report only arises when the auditor 'becomes aware' of material irregularities or other matters that, in its professional opinion, give rise to a duty to report'. In support of its position EY cited two cases for the proposition that the duty to report is contingent on actual awareness of the auditor: *Deloitte Haskins & Sells v National Mutual Life Nominees Ltd* [1993] AC 774 at pp 781 and 787 and *Mercedes Holdings Pty Limited v Waters (No 2)* [2010] 78 ACSR 118. In the latter case the EY submits the Federal Court of Australia had to construe the meaning of the words 'is aware' in s 601HG(4) of the Corporations Act 2001. Under this provision, an auditor must notify the Australian Securities and Investments Commission of any contravention of the Corporations Act. Perram J held that the word 'aware' means actual awareness on the part of the auditor. At para [70]:

> ... There is no doubt that the word 'aware' in that provision connotes a state of actual knowledge.

EY further submits '[t]he Plaintiffs have not disputed those authorities, and have provided absolutely no evidence that EY had *actual awareness* of any material irregularities or other reportable matters'.

[307] I do not find the case *Mercedes Holdings* helpful as s 601HG(4) of the Corporations Act 2001 is not similarly worded as s 85 of the SC Act. Notwithstanding the existence of the phrase 'the auditor is aware', the critical words 'in its professional opinion' is absent in the said provision.

[308] In *Deloitte*'s case, the Privy Council considered the reporting obligation of an auditor of a money market operating company which received deposits from the public on an unsecured basis and the trustee (appointed for the depositors under Securities Act 1978 (New Zealand). Section 50(2) of the Securities Act 1978 provides:

> Duty of auditor to report to trustee or statutory supervisor —
>
> (2) Whenever, in the performance of his duties as auditor, the auditor of an issuer of debt securities or participatory securities offered to the public becomes aware of any matter that in his opinion is relevant to the exercise or performance of the powers or duties of the trustee or statutory supervisor of the securities, he shall, within seven business days of becoming aware, send — (a) To the issuer, a report in writing on the matter; and (b) To the trustee or statutory supervisor, as the case may be, a copy of that report ...

At p 787, Lord Jauncey of Tullichettle (delivering the judgment of the Privy Council) at p 787 held:

> ... However under the former section *the only positive duty imposed upon an auditor is to send timeously a report after he has become aware of a particular matter and has*

formed an opinion that it is relevant to the exercise of the powers or duties of a trustee. The duty to report is accordingly contingent and the only omission by the auditor which can at common law give rise to a breach of duty is failure to exercise reasonable care in the preparation of such report when the circumstances requiring its making have arisen. (Emphasis added.)

[309] In the present case pursuant to s 85(1) of the SC Act, EY's duties as auditor are not confined only to Aldwich or its shareholders but also to the trustee (acting for the entire class of bondholders). A plain reading of s 85 of the SC Act shows the said provision imposes four separate duties on EY (to report to Mayban Trustees or the SC, as the case may be) once it *becomes aware* of the following events:

(a) by s 85(2), to report *as soon as practicable* to Mayban Trustees any matter *in its professional opinion*, relevant to Mayban Trustees' exercise and performance of its powers and duties under:

(i) the SC Act; or

(ii) the trust deed;

(b) by s 85(3), to report *immediately* to the SC:

(i) of any matter which *in its professional opinion* appears to be a contravention of any provision of the SC Act; or

(ii) of any irregularities that may have a material effect on Aldwich's ability to repay (redeem) the bonds.

[310] I find there is a crucial distinction between s 50(2) of the Securities Act 1978 (New Zealand) and our s 85(3) as highlighted by counsel for the plaintiffs:

(a) 'Section 85(3) (*(sic)* — ought to be '85(3)(b)') does not provide for any exercise of an auditor's 'professional opinion' to decide whether to report material irregularities to the SC, Thus, upon being aware of irregularities that may affect an issuer's ability to repay, a Malaysian auditor must report them (unlike a New Zealand auditor in the 1990's)'. It is my respectful view the use of the phrase 'in its professional opinion' in ss 85(2) and 85(3)(a) of the SC Act requires EY to exercise the level of due care as would be exercised by a professional auditor possessed of the same knowledge ie objective standard based on the information available to EY and not according to the EY's subjective exercise of 'in its professional judgment'. It is my respectful view that the same objective standard is to be accorded when interpreting s 85(3)(b) notwithstanding the absence of the word' in its professional opinion'; and

(b) as I have reproduced at para 308 above, the Privy Council in *Deloitte*'s case found the auditor did not contravene s 50(2) of the Securities Act

A 1978 (New Zealand) for the reason which I have emboldened. Subject to the consideration on the phrase 'in its professional opinion', under s 85 of the SC Act however, apart from a similar reporting obligation provided under s 85(2) (similar to s 50(2), an auditor is also required to report any 'contravention of any provision of the [SC Act]' or 'any B irregularities that may have a material effect on the ability of the borrower to repay any amount under the debenture'.

[311] Turing to the salient facts of *Deloitte*'s case (can be gleaned from pp 784–785 of the report) as summarised by the plaintiffs, Deloitte: C

> (i) was appointed auditor in November 1985; (ii) became aware of material irregularities in March 1986; (iii) made a report to the company's trustee in May 1986 pursuant to its statutory reporting obligations; (iv) the trustee however took no action on Deloitte's first D report; (v) made a second report to the trustee on 11 August 1986 pursuant to its statutory reporting obligations; (vi) the trustee only put the company into receivership on 30 August 1986, and incurred liability of NZ$6.75m to the depositors; and (vii) the trustee then sued Deloitte to recover that sum of NZ$6.75m, on the ground that those losses could E have been avoided if it had made its first report two months earlier, that is, in March 1986 instead of May 1986.

[312] I agree with the plaintiffs there are two critical distinctions between *Deloitte*'s case and the present case as captured in the plaintiffs' third reply F submission:

> (i) First, Deloitte actually made 2 reports to the trustee under its statutory reporting obligations, the first being 6 months after it was appointed. In our case, EY as auditor of Aldwich did not make a single report to anyone during the 6 year period of the Aldwich bonds, during which period Aldwich had breached the terms stated G in the IM, the Bond Contracts and the provisions of the SC Act by, inter alia, causing all monies to be paid into Disbursements and not Revenue ...
>
> I have made findings on this earlier.
>
> (ii) The auditor in the Deloitte case, who was appointed a mere 6 months before reporting the issuer's 'material irregularities' was sued for damages allegedly caused H by the 2 month delay in making their first report in May 1986, instead of immediately upon discovering such 'material irregularities' in March 1986. In August 1986, 3 months after their 1st report, the auditor in the Deloitte case made a 2nd report to the trustee. In the instant case on the other hand, EY is being sued for totally failing to make any report at all across the 6 year period, from 2004 to I 2009, during which EY was auditor of both Aldwich and AEM, and had actual knowledge of Aldwich's fraudulent acts and breaches of the Bond covenants. In particular —
>
> (i) EY was appointed auditor of AEM in 1995, and was also the auditor of Aldwich from its incorporation in 2001, and continued to perform these

functions until 2009. Thus, EY had access to all of AEM and Aldwich's financial information (bank statements, trade receipts, etc) from 1995 to 2009, that is, for 15 years; and

(ii) specifically, EY had access to Aldwich's DSRA Account Statements when preparing its DSCR confirmations from 2004 to 2009, that is, for 6 years. In fact, the express terms of the IM mandate that the DSCR ratios, which EY certified every year from 2004 to 2009 are calculated on the basis of 'Net Available Cash', which is defined as 'net operating cash flow for the actual previous 12-month period plus interest income on cash balances, plus all cash balances in the DSRA at such period [clause at C2/666].

[313] In view of the differences, I do not find *Deloitte*'s case helpful. In any event the Court of Appeal in New Zealand in a later case of *Boyd Knight v Purdue* [2000] 3 LRC 238, has expressly disapproved the Privy Council's narrow interpretation of an auditor's reporting duty in *Deloitte*'s case as can be seen from the dicta of Gault J at p 281 paras [9]–[11] and quoting Blanchard J at pp 290–291 para [49] as follows:

> [49] In *Deloitte Haskins and Sells v National Mutual Life Nominees Ltd* [1993] 2 LRC 630 the Privy Council placed a narrow construction, some might say a surprisingly narrow one, on the auditor's duty towards the trustee under s 50(2) of the Securities Act, saying that the effect of the decisions in the courts below, which were reversed, 'was to impose upon the auditor a common law duty more extensive than that imposed by the Act' (see [1993] 2 LRC 630 at 637). There is a need, therefore, to give close consideration to the form of the report required by the regulations in order to determine the extent of the responsibility assumed by the auditors in signing and delivering it for incorporation in a prospectus.

[314] I find EY's contention that it ought not to be held liable for the bondholder's losses because it never became 'aware' of anything amiss that would trigger its reporting obligations qua auditors of Aldwich under s 85 of the SC Act is with respect without merit. EY's own 'Internal Control and Fraud Considerations' dated 19 September 2008 for Aldwich's FYE 2008 audit (B12/2599–2648) is amongst EY's protocols and is a standard document which was used by PW8's (Pushpanathan) audit team in 2008 to assist them in evaluating the effectiveness of the internal controls of their client companies like AEM and Aldwich. The said document wherein PW8 was named as the partner for this audit engagement was produced by EY pursuant to plaintiffs' second specific discovery application against EY. The said document discloses that EY was aware of the five matters in its 2008 audit alluded to at para 369 below.

[315] Based on EY's working papers prepared in June 2008 in the course of Aldwich's 2008 audit, EY had actual knowledge:

(i) that Aldwich had instructed its counterparties to make payment directly into the Disbursement Account (514011-383261). Instead of the Revenue Account (514011-383217) from November 2007 to June 2009 [E10/2208, 2210, 2212, 2249, 2251, 2252, 2253, 2254; E11/2424, 2434, 2466 (Invoice to HSBC Bank USA); 2521 (Invoice to HSBC Bank USA); 2531 (Optimal); E13/2952-2965, 3015-3019, 3022, 3027]; and

(ii) as at 30th June 2008, that all 'other miscellaneous bank accounts (which includes the Revenue Account) has been fairly dormant ... except the operational account i.e disbursement account which are used by the company to run day to day operations' and that 'all major cash expenditure and cash flow receipts go through (the Disbursement Account). [EY's Worksheet, which is part of EY's Working Papers for its 2008 audit of Aldwich, at B12/2502 at 2504].

[316] EY contends it conducted a 'substantive audit' prior to signing off on 2 December 2008 Aldwich's 2008 financial statements for the year ended 30 June 2008 and following that 'substantive audit', EY did not believe that any of the matters listed in paras 314–315 above required a report 'in its professional opinion'. With respect, EY's contention is misconceived. How can such a belief be accepted when gauged in the light of all the contemporaneous evidence; any competent professional auditor would have reported the fraudulent acts and breaches of the IM and the bond contracts which are relevant to the exercise and performance of the powers and duties imposed on Mayban Trustees by the SC Act and the trust deed, would constitute a contravention of the provisions of the SC Act and would have a material effect on the ability of Aldwich (borrower) to repay the amounts under the debenture and to redeem the Aldwich bonds pursuant to ss 85(2) and 85(3) of the SC Act to Mayban Trustees and to SC respectively.

[317] To reiterate the other cause of action of the plaintiff against the EY is for negligence. EY contends that the plaintiffs have in their reply submission (p 116 para 2 and p 119 para 7) acknowledged that they are no longer pursuing the claim in common law negligence and that it has been abandoned. With regret I find EY's submission is totally misconceived for these reasons.

[318] First, I find that counsel for the plaintiffs has expressly put to EY's witness, PW8 that EY was negligent concerning the following:

(a) in failing to detect that Aldwich had credited RM83m directly into its disbursement account (and not revenue account) when EY carried out its annual audits of Aldwich;

(b) in failing to detect that Aldwich had paid out RM16.7m to its principal shareholder, Kamalul;

(c) in failing to detect that Aldwich had paid out RM166m to AEM; and

(d) in failing to detect that no or very little moneys were being credited into Aldwich's revenue account.

[319] Secondly, p 116 para 2 of the plaintiffs' reply submission merely expresses the plaintiffs' position of why '*Caparo* is wholly irrelevant' and why 'EY's reliance on *Caparo* is totally misplaced in the instant case [as] *Caparo* [w]as a case in common law, and is totally divorced from this case, which is governed by an extensive framework of statutory duties'. Likewise at p 119 para 7 the plaintiffs further distinguish *Caparo* and this present case in the following succinct terms:

> In *Caparo*, the acquirer of shares in a company brought an action against the company's auditors, claiming that the acquirer would not have acquired the company but for the auditors' negligent misstatements as to the company's financial health made in the audited financial statements. The House of Lords applying the basic principle that company had a separate legal personality found that the auditors were liable only to the company and not to the acquirer because the auditors were engaged by the company to provide their audit reports. This was a bilateral arrangement between the auditors and the company only. The sole exception recognized by the House of Lords as justifying the extension of the auditors' duty of care beyond the company was to the shareholders of the company in general meeting *only* because the shareholders' interests in the proper management of the company aligned with the company's interests itself, and the auditors were fully aware that their audit report would be relied on by the shareholders in general meeting for that purpose. Thus, the auditors of a company were found not to owe a common law duty of care to anyone relying on the audit reports to assess the merits of investing in the company.

In contrast, in the present case:

(i) The Bonds were intended from the outset to be on sold by Aseam to a fluctuating, indeterminate and unlimited class of potential investors, who could buy, sell or trade the Bonds among each other. It is a capital markets exercise, and is subject to an extensive and over-arching securities law regime: the entire Division 4 of the Securities Commission Act, 1993 (and now, the Capital Markets and Services Act, 2007);

(ii) EY's duties [are] to ensure that the veracity and completeness of all information it provided are owed to an indeterminate class of potential Bond purchasers/investors specifically to enable them to make investment decisions on the Bonds, whereas in *Caparo*, the auditors only owed duties to the company and its shareholders, and

(iii) Caparo only dealt with an *auditor's* liability to third parties for its *audit* report; it plainly does not apply to EY's *Valuation* of AEM's Businesses, annual Actual and Projected *DSCR Confirmations* and review of Aldwich's *Cashflow Projections*.

As to the duty of care owed by the auditors to ensure that all information provided to investors is accurate in order to enable the investors to make 'an

assessment of the merits of investing and *(sic)* the bond', I adopt the view expressed by Mary Lim J in *Pesaka* (HC) judgment that transaction solicitors (which Her Ladyship referred to as 'third parties') owed a duty of care to potential investors and other participants in the bond issue. Such a duty of care, in my respectful view, would be similarly owed by the accountant (being a member of the DDWG which I shall address later).

[320] Based on their submissions EY have raised the following four key issues: (i) EY was not negligent in preparing its *indicative valuation report*; (ii) EY's conduct in its verification of Aldwich's *cashflow projections* does not amount to a breach of s 57 of the SC Act; (iii) EY was not negligent in carrying out its *annual statutory audits* of Aldwich from 2003–2008; and (iv) EY was not negligent in performing its *DSCR certifications* from 2004–2009.

[321] The plaintiffs and EY called their respective expert witness, Ravindran a/l Navaratnam (PW10) ('Ravi') and Sajjad A Akhtar (DW9) ('Sajjad'). Ravindran prepared two reports: Sage 3 first report and Sage 3 second report whilst Sajjad prepared three reports: Sajjad's first, second and third reports (encls 225, 263 and 291 respectively).

(i) EY was not negligent in preparing its indicative valuation report

[322] EY was a member of the DDWG and was represented at their meetings by Ng Seiw Kuan and Angela Lee. EY's valuation team was totally independent of Pushpanathan (DW8) and did not report to him. The auditors (team of seven) and the confirmers (a team of three) though separate reported to DW8. DW8 was the sole witness of fact for EY; neither of the valuation team testified on behalf of EY and no explanation has been offered for not calling them. Kamalul confirmed that EY contributed certain parts to the IM. The two significant items are section 5 of the IM which deals with EY's valuation of AEM's businesses and EY's letter dated 28 January 2003 (C2/549 at 683–695) which deals with the 15-year cashflow forecast and projection.

[323] As the reporting accountant a member of the DDWG, EY voluntarily undertook to:

(a) review Aldwich's cashflow projections from 2003–2018 to verify that they were properly compiled and consistent with the factual assumptions supplied by Aldwich's directors/management (DDWG planning memorandum at D16/25 at 35) and to provide EY's written opinion to this effect for inclusion in the IM; and

(b) to undertake a valuation of AEM's business and to provide a report thereon.

[324] In freely and voluntarily accepting its engagement as a member of the DDWG, EY was aware that it was under a duty pursuant to s 38 of the SC Act to ensure that there were no false or misleading statements or material omissions from the IM by:

(a) acting in a 'comprehensive and probing manner, of the kind that a prudent person would conduct in accordance with general accepted practices of his vocation' (DDWG planning memorandum at D16/25 at 36);

(b) having regard to matters reasonably expected to be within EY's knowledge, as one of the professional advisers; and

(c) that in the event any material discrepancies were identified in the IM after its submission to the Securities Commission ('SC'), 'each DDWG member including EY who becomes aware of the material discrepancy or change of event must report such finding' to Aseam or the SC failing which the members of the DDWG may be deprived of defences available to them' (DDWG planning memorandum at D16/25 at p 41 para 3.6).

[325] EY was also fully aware that its valuation report might be distributed to and relied upon by Aseam, the SC and *potential investors* of the bond issuance, that is, the plaintiffs (section 9(1) of the 'Scope of Work for the Reporting Accountant' (E3/630)). This was admitted by Pushpanathan.

[326] In acting as auditor, EY was under the duty to exercise its professional judgment with an inquiring mind, the importance of such qualities is confirmed by Sajjad.

[327] EY prepared a report titled 'Indicative Valuation of the Business pursuant to the Proposed Transfer of the Business from AEM to Aldwich' ('indicative valuation') by which it ascribed the value of RM308.7m to AEM's existing CR and tank cleaning businesses, and the future WOR business.

[328] EY contends that it was not negligent in preparing the indicative valuation because:

(a) EY did not owe a duty of care to the plaintiffs;

(b) EY did not breach the standard of care expected of it in preparing the indicative valuation; and

(c) EY's actions even if in breach of its duty of care did not cause loss to the plaintiffs.

(a) No duty of care

[329] EY contends that it did not owe a duty of care to the plaintiffs because the following three elements required by the *Caparo* case are not satisfied: (i) it was not foreseeable that the plaintiffs would suffer loss from EY's indicative valuation; (ii) there was no proximity between EY and the plaintiffs; and (iii) it is not fair, just or reasonable to impose a duty of care on EY in the circumstances of this case.

(i) No foreseeability

[330] EY contends that it was not foreseeable that the plaintiffs would suffer loss from relying on its indicative valuation because it:

(a) was never distributed to the plaintiffs;

(b) is not an independent formal business valuation;

(c) was not disclosed in the IM and in fact, only a two line reference to the indicative valuation is present in the IM;

(d) the disclaimer in the IM makes it unforeseeable that the plaintiffs would rely on the indicative valuation;

(e) was not the 'Valuation' required by condition precedent 6 to the issuance of the bonds in the IM; and

(f) the indicative valuation was based on Aldwich's cashflow projections which were mere forecasts and not represented as being achievable.

[331] The aforesaid six contentions of EY turns on EY's allegation on the distinction which they attempt to draw between 'Valuation' in the ordinary commercial sense (independent business valuation) and an 'Indicative Valuation'. I am of the view that such an argument is untenable as a matter of common sense and goes against the grain of the evidence at trial: (i) Saraswathy (DW4) when she agreed under cross-examination that valuation would be the basis of the sale and purchase and that the valuation EY was going to do go to the root of the bond structure; she did not waver in testimony that EY's valuation was accepted by Aseam in satisfaction of CP11 of the subscription agreement (or CP6 of the IM); and (ii) Pushpanathan agreed there was no other valuer than EY. The title to documents means nothing in law: it is a mere label. The law looks at the substance and reality, which is that EY prepared the only valuation report on the businesses, as mandated by the IM.

[332] Further I find EY's submission is without merit for the following reasons submitted by the plaintiffs which I adopt:

(a) the express terms of the DDWG planning memorandum and the IM (which EY co-authored) mandated that EY prepare a 'Valuation Report'. There is not a single mention *anywhere* in the DDWG documentation or the IM that EY was preparing an 'Indicative Valuation'. In fact, all references in the IM are to a 'valuation'. As a member of the DDWG, EY was aware of and agreed to the contents of the IM, and has never subsequently disputed any of the terms therein;

(b) had EY objected to that 'Indicative Valuation' being included in the IM, because it was false or misleading, EY had a continuing obligation to, and was obliged by law (s 38 of the SC Act), to ensure that the IM was corrected. EY did not do so;

(c) Pushpanathan (DW8) admitted that Chapter 5 of the IM is a three page summary of EY's 52 page indicative valuation. EY's contention that there is only a '2 sentence' reference in the IM to the indicative valuation is disingenuous and wholly untrue;

(d) EY was aware from the outset that the sale price for AEM's Business, which was the most critical step in determining the quantum of bonds to be issued by Aldwich to finance the purchase of the Business and construction of the WOR plant, would be fixed on the basis of its valuation of RM308.7m;

(e) EY's contention that the plaintiffs would not rely on the indicative valuation because of the disclaimer in the IM was not pleaded in EY's defence. In any event:

(i) there is no dispute that the IM is not a contract and that there is no contract between EY and the bondholders. Hence EY cannot rely on the disclaimer in the IM. If EY is asserting that the disclaimer in the important notice in the IM is an agreement between the bondholders and the parties named in the disclaimer, and hence entitling EY to rely on the disclaimer, then s 65 of the SC Act renders that agreement (disclaimer) void. Either way, EY and the parties named in the disclaimer cannot rely on it. I adopt what I have expressed in paras 288–292 above; and

(ii) the disclaimer does not absolve EY from its continuing statutory duties under s 38 of the SC Act to ensure that all information it had a part in providing in the IM is not false, misleading or contains material omissions.

[333] The fact that EY was aware by 23 December 2012 that extracts of the valuation would be reproduced in the IM remains undisputed as is evident from EY's email to Aseam dated 23 December 2002 (D16/4), in response to the draft IM:

I (EY) have briefly read *Section 5 of the IM* which is essentially the *extract of the valuation report*. Appears OK at the moment. Will do a thorough review once the IM is in its complete form ...

(ii) No proximity

[334] EY contends that there is no proximity between EY and the plaintiffs because (i) the plaintiffs did not engage or pay EY to prepare the indicative valuation; (ii) the indicative valuation dated 31 February 2002 was prepared one year before the bonds were issued on 15 August 2003; and (iii) EY did not know that whether Aseam as primary subscriber would sell the bonds to secondary purchasers such as the plaintiffs.

[335] With regret I cannot accept aforesaid contentions of EY for the cogent reasons given by the plaintiffs which I adopt:

(a) EY was paid and engaged by Aldwich and AEM to value the business for the sole purpose of determining the transfer consideration for Aldwich for the bonds programme. That transfer consideration was the sum upon which the number of bonds issued would be determined. Given the nature of the bond industry, the plaintiffs as secondary purchasers of the bonds would never have engaged EY simply because the valuation was a condition precedent for the issuance of the bonds, required before the bondholders came into the picture;

(b) EY was a member of the DDWG, knowing full well that its valuation would be included in the IM for the bond programme;

(c) the indicative valuation was prepared to value AEM's business merely eight months before the bonds were issued. This valuation was the value upon which the bonds were issued. The plaintiffs' complaint is that EY's valuation was false and/or misleading and/or contained material omissions at the time it was prepared (31 December 2002);

(d) EY's contention that it did not know whether Aseam as primary subscriber would on-sell the bonds is also false, contrary to the DDWG planning memorandum and the evidence of its witness Pushpanathan (DW8), and demonstrates a total misappreciation of the basis of the bond industry: that bonds are tradeable, and the function of the primary subscriber is to maintain the integrity of the capital markets by ensuring that all products (whether bonds or shares issued in an initial public offering, or IPO) are subscribed for at the time of issuance; and

(e) the important notice in the IM itself states that it was being provided to 'potential investors ... for the sole purpose of assisting them to decide whether or not to subscribe or purchase the Senior Bonds'. An IM or prospectus, as the case may be, is only required when debt/bonds are to

be issued to a large and indeterminate class of potential creditors by way of the capital markets. If Aseam, as primary subscriber, was going to be the only party who would subscribe for the Aldwich bonds and keep them for the 15 year tenure of the bonds, there would be no need for the IM, as Aseam was itself a member of the DDWG. Furthermore, the transaction would be structured as a normal loan transaction between a single banker and a single customer.

(iii) Not fair, just or reasonable to impose duty of care on EY

[336] EY contends it would not be fair, just or reasonable to impose a duty of care on it to the plaintiffs in respect of the indicative valuation because: (i) the bondholders are a fluctuating and indeterminate class; and (ii) the disclaimer in the IM precludes reliance by the plaintiffs on any of the information contained in the IM.

[337] I agree that the EY's contentions are misplaced for the following reasons:

(a) the tradeable nature of the bonds necessarily means that the bondholders are an indeterminate class. EY was fully aware of this because of the reference to 'potential investors' in the DDWG planning memorandum which EY received and agreed to in the IM;

(b) knowing full well that this indeterminate fluctuating class of potential investors would rely on its valuation, and that it was plainly foreseeable that they would suffer loss and damage should the valuation be false and/or misleading, EY clearly owe potential investors a duty of care to ensure that its valuation was not false or misleading or that there were material omissions therefrom; and

(c) the disclaimer in the IM does not assist EY in avoiding its liability for the reasons which I have alluded to in paras 288–293 above.

[338] Further to EY's duty under s 38 of the SC Act which I have alluded to, for the reasons stated I am of the view that EY owed a duty of care to the plaintiffs in common law.

(b) Whether EY breached its duty of care

[339] EY contends that it acted with the standard of care required of a professional valuer in the circumstances of this case because:

(a) it conducted its valuation on an 'agreed upon procedures' engagement and not to the higher standard of care required of a 'formal valuation';

(b) it was not required to discuss other valuation methods in its indicative

valuation report or the IM because 'sophisticated investors' like the plaintiffs would have known about other valuation methods and therefore did not require any explanations unlike say, ordinary investors;

(c) EY's use of Aldwich's cashflow projections as the basis of its indicative valuation was reasonable in the circumstances because it was an 'agreed upon procedures' engagement and in any event, this was disclosed in the IM;

(d) EY did not breach its standard of care by finding that Aldwich did in fact have long-term contracts for its CR and WOR businesses when performing its valuation of those businesses;

(e) EY did not breach its standard of care by using a discount rate of 14% as was proposed by AEM for the junior notes; and

(f) EY is entitled to rely on the statutory due diligence defence under ss 59 and 60 of the SC Act because it relied on the cashflow projections provided by Aldwich when performing its DCF valuation of the business.

[340] In my judgment I find EY's contentions are without merit for the reasons given by the plaintiffs which I adopt:

(a) there is no reference anywhere in the IM or the DDWG planning memorandum that EY would perform an indicative valuation on 'agreed upon procedures'. In fact, every single reference in those two key documents states that a 'valuation' would be prepared. EY appears to suggest that provisions in its indicative valuation report and/or in a letter of engagement solely between Aldwich/AEM and EY ought to be given effect over the terms of a statutory prospectus (the IM) and DDWG planning memorandum in which EY was expressly mandated with carrying out a 'Valuation', and which it agreed to. With respect I reject EY's argument;

(b) the plaintiffs' contention is that EY failed to list out the other valuation methods that it allegedly considered, and to state the different values produced by those other valuation methods (asset-based and earnings-based) because this deprived the plaintiffs of the opportunity to properly analyse the reasonableness of EY's valuation of AEM's business at RM308.7m. The 16 bundles of documents produced by EY do not contain a single document evidencing EY's consideration of other valuation methods or the values which would have been so produced; and

(c) in relation to EY's contention in para 339(a) above, EY used the wrong valuation methodology, in the form of the DCF method (based on Aldwich's cashflow projections), when it ought properly to have used an earnings-based

EBITDA method for the CR and tank cleaning businesses (which had an established 2.5 year track record) and an assets-based method for the WOR business given that it had not commenced operations at all. The most glaring result of EY's mistaken reliance on the DCF method is that the CR business, which had assets worth RM9m and had only been operating for 2.5 years, was valued by EY at RM112m.

I find the evidence revealed the following: EY's acceptance of the DCF method was advocated by AEM was admitted by Pushpanathan. Although the IM says EY was doing the valuation, when cross-examined, Pushpanathan refused to accept that they had chosen the DCF method, claiming that it was chosen by the client (AEM) with the concurrence of Aseam.

Further, EY negligently accepted Aldwich's attribution of goodwill of RM103m (amortised to RM97m) to the CR. Note 5 to the 2004 audited financial statements of Aldwich:

> *Goodwill arose from the purchase of book debts, novated contracts, industrial property rights, a piece of land measuring approximately 80,000 square meters in Terengganu, licences, plant machinery and equipment, stock, information pertaining to the business and assigned rights and benefits* under Business Sales Agreement 1, dated 13 May 2003. Goodwill is amortised over 17 years which represent the legal maturity period from the issuance of the Negotiable Zero-Coupon Senior Secured Serial Bonds. (Emphsis added.)

The goodwill of RM103m comprised the following nine elements:

(a) book debts;

(b) novated contracts;

(c) industrial property rights;

(d) the Kemaman land;

(e) licences;

(f) plant, machinery and equipment;

(g) stock;

(h) information pertaining to the business; and

(i) assigned rights and benefits.

Pushpanathan was vigorously cross-examined by counsel for the bondholders on this point and I cite below examples to show EY's attribution of goodwill is flawed.

When counsel for the bondholders began by suggesting to Pushpanathan (DW8) that goodwill means reputation of a business, he disagreed and insisted on the word 'brand' as opposed to 'reputation', he was quibbling on semantics as the natural and ordinary meaning of 'brand' means the 'reputation' of a

particular product or company; he agreed that 'book debt' and 'land' are not components of 'goodwill'; he sought to explain that goodwill arises from an excess, ie what a willing buyer is prepared to pay on top of the value of the purchased asset, yet, he was unable to explain what that excess was when given the opportunity to do so.

The assessment on the alternative valuation methods given by Ravi are: First 'asset-based approach': involved simply extracting the value of the CR business from the information already contained in AEM's audited financial statements for the year 2002. Using this method in relation to the CR business, Ravi arrived at the figure of RM36,358,778 (compared to EY's valuation of RM119m). The second valuation method was an earnings based approach which used the CR business' EBITDA (earnings before interest costs, tax deductions, depreciation and amortisation) to arrive at the earnings (or cash flow) generated by the CR business. Ravi arrived at a valuation of RM48.26m using the EBITDA valuation method (compared to EY's valuation of RM119m by using the DCF method). Ravi arrived at a valuation of RM48.26m using the EBITDA valuation method (compared to EY's valuation of RM119m by using the DCF method).

EY's expert Sajjad accepts that the typical EBITDA for an industrial business in 2002 was 9.23 times, which is not very different from Ravi's EBITDA multiple of seven times. The experts from both sides have therefore arrived at a range between 7 and 9.23 times. EY's valuation produces an EBITDA multiple of 17.26 times, that is, double the accepted range. It is plainly wrong, and EY clearly ascribed a value to the CR business of more than double what it was actually worth.

In relation to the WOR business, using the asset-based approach, Ravi arrived at a figure of RM119.5m, significantly lower than EY's valuation of RM181m. Ravi then considered the suitability of an earnings based method of valuation to the WOR business. He was unable to do so because the WOR business had not yet commenced operations (and therefore had no historical or actual earnings) and, in any event, was the first plant of its kind in Malaysia. Thus, there was no evidence which he could rely on in using an earnings-based method, whether by way of a DCF or an EBITDA valuation.

Therefore I find EY was negligent in its valuation of the WOR plant by using the DCF method and solely relying on AEM's speculative projections. There was no basis, whether in the form of long-term contracts or AEM's past experience in the WOR business, for EY to form an opinion on the reliability of those projections. As was stated by Ravi of Sage 3, EY's failure to perform alternative valuations resulted in the absence of a 'sanity check' to EY's valuation, to ensure that it did not arrive at a wholly incredible value. This is particularly critical given that Pushpanathan conceded that it is 'a fact' that had EY used any other valuation method, it would have resulted in a lower valuation of AEM's business;

(d) EY's contention that its wholesale adoption of Aldwich's cashflow

projections was reasonable because EY was performing an 'agreed upon engagement' and not a formal valuation, is also misplaced because both the IM and the DDWG planning memorandum mandated that EY perform a 'valuation'. I find EY was in fact supposed to perform an actual, independent and formal valuation of AEM's business but in departing from that mandate based on its 'engagement letter' with AEM/Aldwich did not ensure that the IM was amended to reflect this or that the DDWG planning memorandum was similarly amended;

(e) EY's contention that it did not breach the standard of care required of it because there were in fact 'long-term contracts' for the CR and WOR business sufficient to found EY's use of the DCF Valuation method, is also misplaced. It is a fact that the CR business' alleged '10 year contract' with Petronas's subsidiary was in fact a contract determinable by that party at only 1 months' notice, and was only expressed to be for the supply of two or three shipments of precious metal catalysts in a ten year period: thus, if Petronas sent three shipments in 11 months, the contract would end ... It is even more evident for the WOR business that there was no long term contract because there was merely a non-binding memorandum of Intent for the supply of waste oil to Aldwich's WOR plant;

(f) the other complaint of the plaintiffs was EY's adoption of the 14% discount rate for the junior bonds. It is a fact that a lower discount rate resulted in a higher number of junior bonds issued. It was also accepted by EY's own expert Sajjad in cross-examination by counsel for the bondholders that a discount rate of 28% (which was the then prevailing discount rate for bonds in the market rated the same as the Class C and D junior notes) would have instead been appropriate if EY had carried out an independent business valuation and not an indicative valuation. In the context of the IM and the DDWG planning memorandum both only stating that EY was to perform a valuation and containing no mention of any 'indicative valuation', Sajjad's concession is effectively an admission that EY used the wrong discount rate (NP9/Day 38/p 269 L32–p 270 L25); and

(g) EY's attempts to rely on the due diligence defence in ss 59 and 60 of the SC Act are also misplaced. In order to invoke that defence successfully EY would need to establish that it made all enquiries as were reasonable in the circumstances when relying on Aldwich's cashflow projections. I find EY did not make any enquiries as to Aldwich's cashflow projections because it was aware that they were mere forecasts, and EY was performing its 'agreed upon procedures' and circumscribed indicative valuation. EY cannot on the one hand contend that it was performing an indicative valuation (and not a formal independent valuation), and on the other hand contend that it made all enquiries necessary to establish that Aldwich's cashflow projections were not

false, misleading or contained material omissions. This is particularly so, when EY themselves submit the cashflow projections were forecasts; were not reliable, and were not representative of Aldwich's ability to achieve such forecast profits. Further, none of the voluminous documents discovered by EY at trial evidence EY's consideration of the other valuation methods in arriving at the valuation of AEM's business. Hence, the irresistible inference to be drawn is that EY simply did not consider the other valuation methods.

[341] For the above said reasons, I find that EY failed to act with the standard of care required of an independent valuer carrying out a valuation of a business.

(c) Causation

[342] Under this heading, EY contends the element of causation is not satisfied because EY's valuation of RM308.7m in the indicative valuation: (i) was not relied on by the plaintiffs; and (ii) did not cause the plaintiffs' loss.

[343] With respect there is no merit in EY's contentions for the reasons in plaintiff's submission which I adopt:

(a) EY's indicative valuation of RM308.7m was critical in determining the amount of bonds issued: it went to the root of the bond programme. But for EY valuing AEM's business at RM308.7m, the senior bonds would not have been issued at all; or at a much lesser sum than RM176m (RM293m nominal value). The plaintiffs purchased these bonds; and

(b) on EY's contention that the plaintiffs suffered no loss by reason of its indicative valuation, Ravi of Sage 3's expert opinion is that AEM's business was only worth RM169.76m. The difference between EY's valuation and Ravi's valuation of AEM's business is RM138.94m. That is the minimum measure of the plaintiffs' losses suffered by reason of EY's negligent valuation of AEM's business. Evidence was also led at the trial that if AEM's business was valued at a lower sum, the bonds might not have been issued at all, or even if issued, for a far lesser sum resulting in some plaintiffs not subscribing for the bonds. Hence, but for EY's valuation, the bondholders would not have suffered loss or damage.

(ii) Cashflow projections

[344] EY based on *Caparo*'s three pronged test contends that it was not negligent in its review of Aldwich's cashflow projections because:

(a) the cashflow projections were properly compiled based on Aldwich's factual assumptions and EY made no representations on the achievability of results forecasted in the cashflow projections; and

(b) EY's liability ought to be limited to the fees it was paid by AEM/Aldwich, as is expressly stipulated in EY's letter of engagement.

[345] By virtue of section 9.6 of the IM the plaintiffs have no issue with EY's contention that they only reviewed Aldwich's 15 year cashflow projections to ensure that they were properly prepared based on the information and assumptions furnished by Aldwich and AEM and these 15 year cashflow projections could not reasonably be relied on by the plaintiffs, and in any event, are not indicative of Aldwich's ability to repay the bonds.

[346] However the plaintiffs do take issue with EY's preparation of the cashflow projections insofar as that there is no mention that Aldwich would only be receiving 15% of the proceeds from the CR business, rather than 100%. It is undisputed that the cashflow projections state 100% of Aldwich's CR business revenue. EY's contention is that any reader of the cashflow projections will realise upon reading the 'cost of sales' portion that Aldwich will have to pay out 75–80% of those revenues to the party it gets the precious metal catalyst waste from.

Whilst the plaintiffs do not dispute this, the plaintiffs' concern is according to the cashflow projections read with the IM, 100% of Aldwich's revenues will enter its accounts. The 'ring-fencing' structure of the designated accounts dictates that 100% of revenue must enter the revenue account. That the revenue account is meant to capture 100% (and not 15%) of the proceeds of sales of precious metals was admitted by EY's own expert Sajjad. However only 15% of some of the sale proceeds were credited into Aldwich's disbursement account (not its revenue account), hence I agree with the plaintiffs' submission that the IM and the cashflow projections are false, misleading and contain material omissions, in breach of s 38 of the SC Act.

[347] The plaintiffs were also concerned about EY's reliance on Aldwich's cashflow projections when issuing its indicative valuation report dated 31 January 2002. The IM containing EY's valuation figure of RM308.7m and the summary of EY's valuation methods in Chapter 5, was issued in May 2003, and the bonds were issued on 15 August 2003. Thus, if the cashflow projections were, as EY now contends, so unreliable that the plaintiffs ought not have relied on them, EY ought not to have relied on the same cashflow projections as the sole basis for its DCF valuation method which produced the valuation sum of RM308.7m for AEM's business, stated in the IM bearing in mind that s 38 of the SC Act imposes a duty on EY to ensure that the IM contained no false or misleading information or material omissions. EY cannot approbate and reprobate by 'downplaying the Cashflow Projections' reliability and accuracy on one hand and then solely rely on them when valuing the business on the other.

[348] I find EY's argument that its liability ought to be limited by a clause in the engagement letter dated 24 September 2002 (E/16 p 3420) is with respect untenable as the bondholders are not a party to that letter of engagement and are not bound by its terms. It is settled law that a clause disclaiming or limiting liability must be part of a contract with the person relying on the clause being a contracting party. It must expressly be brought to the attention of the party against whom it is sought to be enforced. There is no evidence that EY's letter of engagement was ever disclosed to the plaintiffs, Aseam or Mayban Trustee. Thus the disclaimer in EY's letter of engagement cannot be enforced against the plaintiffs or any of the other players in the Aldwich bond issuance save for Aldwich and AEM.

(iii) Audit

[349] Under this issue EY contends that:

(a) Ravi's expert evidence on its audit conduct ought to be disregarded by the court because Ravi is not an expert in the field of auditing;

(b) EY's duty under s 85 of the SC Act to report Aldwich's breaches of bond covenants was not triggered because EY did not become aware of such breaches in the exercise of its professional judgment;

(c) EY did not owe a duty of care to the plaintiffs in the conduct of its audit because the plaintiffs are not members of Aldwich; and

(d) EY did not breach the standard of care expected of statutory auditors in its annual audits of Aldwich.

(a) Ravi's audit expertise

[350] EY contends that Ravi is not an expert witness as:

(a) he does not possess sufficient audit experience to be considered an expert in the field of auditing;

(b) Ravi's reports do not comply with O 40A of the Rules of Court 2012 ('the ROC 2012') because Ravi has not stated the sources of information he referred to therein; and

(c) Ravi's reports contain errors and are misleading.

[351] In addressing the thorny issue of Ravi's expert evidence vis a vis Sajjad's expert evidence I have perused the large body of evidence at trial including the submissions by respective counsel for the plaintiffs and EY and given it anxious consideration. I have not given any weight to the plaintiffs' contention that Sajjad is not an independent expert witness as the evidence shows that Sajjad was never employed by EY, never did work for AEM or Aldwich and there is no

indication that Sajjad and Pushpanathan were acquainted during their tenures at Arthur Andersen: the former was a partner in Singapore whilst the latter was a partner in Malaysia. I am also mindful of Sajjad's credentials as per his curriculum vitae found in Appendix A to Sajjad's first report.

[352] In respect of *ground (i)* above, EY contends that Ravi's evidence on EY's negligence in failing to meet the standard of care required of an auditor ought to be given minimal weight because Ravi is not a practising auditor, and only has four years of auditing experience in a junior role from 1989–1992. Ravi's evidence is he is able to lead an audit but would not be an audit partner because he has not put in the years of practice at an audit firm and applied for a licence. It is my respectful view from Ravi's ability to analyse EY's audit conduct is acceptable based on his working experience in corporate finance, valuation and company restructuring for 25 years where he customarily deals with auditors, issues of going concern and distressed companies on a regular basis. Further Ravi's list of previous posts/employers (General Manager of Danaharta, Chief Information Officer of Bursa Malaysia, Pricewaterhouse Cooper Financial Advisory, Restructuring Specialist at Sage 3 Capital) are reputable. I will address later on the reliability of his findings as to EY's negligence and breach of its statutory duties under s 85 of the SC Act in para 355 below.

[353] In respect of *ground (ii)* above, it is my respectful view that Ravi's use of a basic accounting textbook and information from a newspaper article as contained in section 3 of his report was in order to elucidate and simplify basic concepts on the four types of audit reports as an explanation for the court; he explained that an expert report was not a literary or academic work, but rather a substantive analysis prepared for the assistance of the court. Under these circumstances I do not find the allegation of plagiarism bears merit and besides the excerpts from these two sources do not affect Ravi's findings or the validity of his report.

[354] In respect of *ground (iii)* above, EY urges the court to give minimal weight to all of Ravi's findings because of the six errors he apologised. I find Ravi's conduct in candidly conceding to his errors ought not to work against him rather, if at all, it demonstrates he is an honest and independent witness and not biased towards the plaintiffs' cause. I am mindful that some of Ravi's errors on EY's audit conduct resulted from the fact that EY had not yet provided all its audit documents in January 2014 when Ravi's first report was produced.

(b) EY under no duty to report pursuant to s 85 of the SC Act

[355] There is this body of evidence adduced by the plaintiffs:

A (a) EY had access to the monthly bank statements for Aldwich's six designated accounts;

(b) EY knew about the trust arrangement under the supplemental BSAs between AEM and Aldwich;

B (c) EY knew that as a result of the sale of businesses from AEM to Aldwich, it was intended that AEM was to cease carrying on the business after it was transferred from AEM to Aldwich;

(d) EY knew that revenue stream was critical to Aldwich, which would be C captured by revenue controlled solely by Aseam; and

(e) Pushpanathan conceded that an auditor is required to have an inquiring mind in carrying out his audit duties: it is a skilful exercise whereby an auditor must probe, verify and not accept management's representations at face value.

D

[356] EY was negligent because it failed to:

(a) have sufficient knowledge of Aldwich and AEM's complex businesses, as this exchange during cross-examination between counsel for E bondholders with Kamalul indicates, for eg, Kamalul said in cross-examination the people who are helping Pushpanathan do the actual audit in Aldwich did not show him document at p 836 at E4, and say 'Look this major customer is HSBC USA, they owe us 7.4 million, can you walk us through this transaction?';

F (b) ascertain whether revenue credited into AEM's account (not a designated account) as described in exh P4, was paid into the revenue account despite having knowledge of the trust arrangement under the supplemental BSAs;

G (c) appreciate that *32 separate payments totalling RM166m* were paid out from Aldwich's disbursement account (controlled solely by Aldwich) to AEM's Account (not a designated account) were not credited into revenue (controlled solely by Aseam) in the first place; (NP8/Day 35/p 48 line 31 to p 49 line 3);

H (d) appreciate that the *said 32 payments were flowing in the opposite direction* from Aldwich's disbursement account (controlled solely by Aldwich) to AEM's account (not a designated account), contrary to what was expressly stated in the supplemental BSAs; (NP8/Day 35/p 50 line 13 to I p 51 line 35);

(e) appreciate that *7 separate payments totalling RM16.7m* were paid out from Aldwich's disbursement account (controlled solely by Aldwich) *to Kamalul*, in circumstances where they were not redemption of the junior notes; (NP8/Day 35/p 57 line 27 to p 59 line 30);

(f) appreciate the significance of the five designated accounts controlled solely by Aseam being dormant, with very little monies being credited for long periods; (NP9/Day 36/p 45 line 12 to p 46 line 1); and

(g) appreciate the significance of having very minimal activity in revenue (NP8/Day 35/p 94 line 2 to p 95 line 7).

[357] I find that Pushpanathan was not aware of his duty to report Aldwich's breaches of the trust deed to Mayban Trustees. This is evident from the following evidence:

KVS	Now my question is, based on the priority of payment what was the impact on payment into DSRA if those 25 payments were credited into Disbursement Account instead of the Revenue Account
KEN	In totality there would not be a difference if the amounts had been banked into the company's bank accounts - any of those designated accounts — if it was in the other account by accident its still within the company's accounts for purpose of the statutory audit. So I would think it would not be a material difference.

(NP9/Day 39/p 47 L 35 p 48 L 2.)

[358] EY submits it had no duty to monitor Aldwich's obligations in respect of the bonds because EY was not engaged as a 'monitoring accountant', and 'if these monitoring functions were intended to be provided at no cost by the company's auditor, there would be no need for anyone to ever engage a monitoring accountant'.

[359] I agree with the plaintiffs that 'Section 85 of the SCA does not contain the word 'monitoring accountant'. It imposes monitoring duties on auditors of a bond issuer to report any matters relevant to the exercise and performance of Mayban Trustees' duties, or Aldwich's ability to repay the bonds. It must be noted that there is no SC Act provision on 'monitoring accountants'.

[360] In addition I adopt all the matters which I have addressed in relation to this issue in paras 303–316 above. For the reasons which I stated therein, in my judgment there is no merit in EY's contention that it was not under the duty to monitor Aldwich's compliance of its covenants in the bond contracts.

(c) No duty of care owed by EY to the plaintiffs

[361] EY contends that it did not owe a duty of care to the plaintiffs because:

(a) it was not foreseeable that the plaintiffs would suffer loss as a result of EY's negligence in its conduct of Aldwich's annual audits;

(b) there was no proximity between EY and the plaintiffs; and

(c) it would not be fair, just or reasonable to impose such a duty on EY.

[362] EY contends that it is entitled by way of the 'Bannerman' clause in Aldwich's annual audited financial statements, to exclude all liability as auditor towards the plaintiffs, because 'there is no evidence indicating that EY's engagement as the auditor of Aldwich involved something different from, or over and above, that of a normal statutory auditor'.

[363] With respect I disagree. I have made my findings with regard to the duties imposed on the auditors of bond issuers under s 85 of the SC Act, I am persuaded by the plaintiffs' submission that s 85 of the SC Act is titled 'Duty of auditor to trustee for debenture holders'. Aldwich issued bonds, which are debentures within the meaning of s 2 of the SC Act. The plaintiff bondholders were accordingly debenture holders. Mayban Trustee was the trustee to the plaintiff debenture holders. EY, as auditors of Aldwich, accordingly owed s 85 duties to Mayban Trustees.

[364] In the case of *CIMB Investment Bank Berhad v Ernst & Young (didakwa sebagai sebuah firma) and another appeal* [2014] MLJU 1841; [2014] 6 CLJ 438 which arose on an application under O 14A or O 33 of the ROC 2012 by the defendant auditors, EY on the issue of whether EY owed a duty of care to the appellants, who were fund managers which had invested their clients' funds with an asset manager audited by EY. While the Federal Court held on appeal that that case was unsuitable for preliminary determination on a point of law and remitted it for trial, I agree with the submission of the Plaintiffs that the reasoning of the Court of Appeal in imposing such a common law duty of care on the auditors remains valid.

First, the Court of Appeal at p 450 para [19] disapproved of the High Court's findings that the key elements of foreseeability and proximity required to impose a duty of care were absent, in that:

> The basis for Her Ladyship's ruling of the absence of duty of care under the common law may be summarised to be the following three grounds:
>
> (a) The appellants (CIMB) were not the original and intended recipients of the audit reports;
>
> (b) the purpose of the reports was not for making investment decisions; and
>
> (c) there were disclaimers as to the purpose for which the audit reports were made, which excluded third parties such as the appellants.

His Lordship K Anantham JCA delivering the unanimous decision of the Court of Appeal held that the proper test to be applied when determining whether the auditors owed a duty of care to investors in the circumstances of that case was not the *Caparo* three-prong test, but instead the 'assumption of responsibility' test in *White and another v Jones and others* [1995] 2 AC 207. The Court of Appeal also adopted the ratio of the High Court of Australia in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] 244 ALR 552 as follows:

> [50] We are fortified in coming to the conclusion that the respondent as auditors should have foreseen economic loss to the appellants in these circumstances by the decision of the High Court of Australia in relatively similar circumstances and *involving an auditor and investors with the intermediary being a company in which the investors had invested funds*. In this case, the company sought a contribution from the auditors on the grounds that:
>
> (a) KPMG as the *auditors owed a duty of care to a confined class or persons, namely, the investors in the company*. The applicant claimant was one such member of that class;
>
> (b) The *auditor in the conduct of its audit of the company breached that duty of care*;
>
> (c) If the auditors had not breached that duty of care, its *audit report would have been qualified and the irregularities in the account would have been reported to the ASIA* and the company's directors;
>
> (d) This would have *caused the company to cease trading, which would have reduced the damages* suffered by the applicant;
>
> (e) The company had a custodial role in relation to the investments;
>
> (f) The *investors, such as the applicant, were therefore in a position of vulnerability because they had not means of checking or ensure the safety of their investments held by the company*; and
>
> (g) The *auditors were in a position of control, having the ability and power to detect and report any irregularities that would put the investment at risk*. (Emphasis added.)

The Court of Appeal concluded by stating at p 469 paras [60]–[61]:

> In our opinion, the duty of care arose in this manner. If the respondent had not breached their duty of care, the audit reports would have been qualified and the irregularity in the accounts of SJAM would have been reported to the SC. Such a report to the SC, in turn, would have caused the SC to take the appropriate action thereby causing SJAM to cease trading and consequently diminish the losses of the appellants. This is precisely what happened on the facts of this case. However, *because the audit reports that were produced by the respondent were 'clean', the SC took action much later and the ensuing winding up of SJAM was correspondingly delayed thereby causing substantially more losses to the appellants*. What is significant about the aforesaid facts, in the context of the 'assumption of responsibility test' and the

related ingredients of 'control and vulnerability' is that *during the whole of this period the respondent was in a position of control, having the ability and power to detect any irregularities which would put the investments at risk*. In this respect, *the finding of the [learned Judicial Commissioner] that the audit report was not prepared for the benefit of the investors has been consistently rejected by the courts of Australia*.

Transposed to the factual matrix in this present case, that is precisely the plaintiffs' complaint in this case. I agree with the plaintiffs' submission:

(i) EY was in a position of control, having the power to detect irregularities in Aldwich's accounts and Aldwich's breaches of its Bond covenants during its 5 annual audits from 2003 to 2008;

(ii) Had EY not breached its duty of care by acting negligently in the conduct of its audits, it would have detected these irregularities and breaches as early as June 2004 (EY's first audit of Aldwich post-Bond issuance) and reported them to the SC, or Mayban Trustees, or both;

(iii) In that event, the losses of the Plaintiffs would have been significantly if not completely mitigated because they would have known much earlier that Aldwich was acting in breach of the Trust Deed and the provisions of the SC Act.

[365] Counsel for EY urges the court to adopt the approach of *Dato' Ariff Wan Hamzah & Ors v Hwang DBSInvestment Bank Bhd & Anor* [2013] 1 MLJ 526 at pp 562–563 paras [116]–[118] where the Her Ladyship Nallini Pathmanathan J (now JCA) held that it was not the reporting accountant's function to assess or review the veracity, accuracy or probability of the assumptions and the reporting accountant was not responsible for holding out or verifying the accuracy of the factual matrix underlying the assumptions. In this regard I am guided by the Court of Appeal case of *CIMB Investment Bank Berhad v Ernst & Young (didakwa sebagai sebuah firma) and another appeal*. With respect I disagree that the aforesaid case has no precedential value.

(d) Whether EY breached the required standard of care

[366] EY contends that it did not breach the standard of care required of a professional auditor because:

(a) EY properly recognised Aldwich's revenues in its audited financial statements;

(b) EY was under no duty to monitor Aldwich's breaches of its bond contracts;

(c) EY could not have detected every breach of Aldwich's bond covenants because EY conducted its audits on a 'sampling' basis, that is, by only checking a limited proportion of Aldwich's transactions rather than every transaction;

(d) any transactions by Aldwich in breach of its bond covenants were not identified by EY because such transactions occurred after EY's 2008 audit exercise; and

(e) there was 'no difference' if Aldwich's monies went into its disbursement account instead of its revenue account.

[367] I adopt the complaints of the plaintiffs' summary of complaints against EY.

[368] Despite having access to all of Aldwich's bank account statements (including the disbursement and revenue accounts), EY failed to detect in its June 2004 audit of Aldwich and consequently to report to Mayban Trustees that Aldwich had breached the bond contracts in May 2004 by failing to credit all its sales proceeds and all other monies into its revenue account.

[369] EY's negligence in its conduct of Aldwich's annual audits is also apparent by its failure to make any report to the SC or Mayban Trustees despite identifying the following five matters in its 2008 audit which has been succinctly captured in the plaintiffs' submission:

(a) identified fraud risk factors, in the form of 'management pressure to achieve better financial results in order to fulfil the requirement held by the subscribers of zero coupon senior secured serial notes and shows a stable outlook and better rating on the bond' (B12/2607);

(b) 'Book-keeping system (filing system and documentation) for finance department are *deficient* ... journal entries unsupported, *incomplete set of supporting documents, loss of documents* due to misplaced and loss in transit' (B12/2616);

(c) 'All this while audit has been performed in the plant ... for year 2008 audit, management has arranged the audit to be carried out in HQ ... *no proper filing system, sequence no and instances of loss and misplaced of documents*' (B12/2634);

(d) management has '*manipulate the fax copy of bank documents* (BA) by changing the name' from AEM to Aldwich (B12/2634); and

(e) '*Domineering management behaviour* ... attempts to influence the scope of our work or the selection ... *restricted our access to the documents* and files provided only upon request ... *management* also attempts to

A influence the scope of our work by *arguing basis and the selection on our samples*' (B12/2640).

[370] Despite all these matters, EY gave an unqualified opinion every year on Aldwich's 2004–2008 financial statements. EY's recognition of Aldwich's B management's attempts to manipulate documents and influence EY's sampling selection are particularly pertinent given that EY completely failed to detect that:

(a) C sums totalling RM83m had been paid into Aldwich's disbursement account (instead of its revenue account) over a four year period;

(b) a sum of RM16.7m had been paid from Aldwich's disbursement account to Kamalul between October 2006–July 2009; and worst of all, that; and

D (c) sums totalling RM166m were paid from Aldwich's disbursement account to AEM in the 1.5 years preceding Aldwich's default on the bonds in October 2009.

[371] Despite carrying out statutory audits for five years from 2004–2008 E (and starting its 2009 audit) and recognising concerns over fraudulent manipulation of documents by Aldwich's management, EY failed to detect the movement of more than *RM265m* in and out of Aldwich's disbursement account (despite having bank statements for that account), in breach of the trust deed, and which would clearly have affected Aldwich's ability to repay the F bonds. For the above-mentioned reasons, I find EY negligent.

[372] In this regard, I rely on the case of *Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd and Others* [1958] 1 All ER 11 (HL) as to the proper function of an auditor, where Lord Denning, inter alia, at p 23B–H G particularly opined:

> *An auditor is not to be confined to the mechanics of checking vouchers and making arithmetical computations. He is not to be written off as a professional 'adder-upper and subtracter'. His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths.* To perform H this task properly, *he must come to it with an inquiring mind* — not suspicious of dishonesty, I agree — *but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none. … But the check, to be effective, may require some legal knowledge, or some knowledge of patents or other specialty. …* (Emphasis added.)

I

[373] Lord Denning's dicta in *Fomento* was quoted with approval in *PlanAssure Pac formerly known as Patrick Lee Pac v Gaelic Inns Pte Ltd* [2007] 4 SLR 513 where the Court of Appeal of Singapore held the appellant auditor was liable. What I find instructive is the following observation of Justice VK

Rajah on the appellant auditor's failure in paying attention to the customer's internal control system. At p 537 paras [78]–[79] His Lordship opined:

> *The appellant had been plainly oblivious to the possibility of fraud on the facts. The appellant had paid scant attention to the flaws in the respondent's internal control system*. While the appellant had made general reference to the respondent's failure to put in place checks of a systemic nature and to conduct spot checks on cash, *the appellant had not seen fit to issue any management letters highlighting such weaknesses to the respondent. In fact, it is pertinent to note that the appellant had not even placed on record the existence of loopholes in the respondent's control systems nor expressed any concerns about the increase in 'uncredited lodgments'*.
>
> *In discharging its functions the appellant appeared to have conducted itself merely as a technician verifying arithmetical accuracy than as a professional seeking assurance that the underlying records supported the financial statements …* (Emphasis added.)

(e) Whether EY's negligence caused the plaintiffs' losses

[374] EY contends that any negligence on its part in failing to detect Aldwich's breaches of the bond contracts in the course of EY's annual audits of Aldwich from 2003–2008 — (i) are not material because the plaintiffs did not rely on EY's audit reports; and (ii) did not cause the plaintiffs' losses.

[375] I am persuaded by the plaintiffs submission that if EY had detected Aldwich's breaches of the bond contracts in 2004, the plaintiffs' losses of *RM242m* (as at 31 July 2012) would have been avoided because:

(a) the *RM265m* in monies moving outside the 'ring-fencing' structure which were either credited directly into the disbursement account (RM83m from HSBC London) or dissipated to Kamalul (RM16.7m) and AEM (RM1,667m) would have been remitted into Aldwich's revenue account, from which it could not have been removed without Aseam's express consent, as sole signatory to the revenue account; and

(b) Aldwich and AEM would have been made to account for *all* revenue and sales proceeds, which to date, despite the several discovery orders and trial, Aldwich, AEM and Kamalul have failed to do.

(iv) Annual DSCR certifications

[376] EY contends that it ought not to be held negligent for its annual DSCR confirmations because:

(a) EY does not owe any duty of care to the plaintiffs in certifying Aldwich's actual and projected DSCR ratios;

(b) EY did not breach its standard of care when confirming the DSCR ratios; and

(c) EY's certification of Aldwich's DSCR ratios, and in particular Aldwich's 2009 DSCR ratio, did not cause loss to the plaintiffs.

(a) Whether EY duty of care owed

[377] EY contends that it did not owe the plaintiffs a duty of care because the DSCR letters were not for the bondholders, but for Aseam and Mayban Trustees. It is for this reason that EY contends there was no proximity between EY and the plaintiffs, and it is not fair, just or reasonable to impose a duty of care on EY to the plaintiffs.

[378] With repect in my view this submission is wholly misplaced by the fact that the IM required EY to certify that Aldwich's actual and projected DSCR was above 1.5 times at the end of each of Aldwich's financial years. EY was aware of the terms of the IM. Thus, EY was aware that Aldwich's failure to maintain these DSCR ratios would be a trigger event' which had to be reported to the bondholders by Mayban Trustee. EY in knowing that its annual confirmations of Aldwich's actual and projected DSCR ratios would be relied on by the bondholders as fair weather indicators of Aldwich's financial ability to repay the next annual tranche bond repayment, and issuing its DSCR confirmations for that purpose, clearly owed a duty of care to the plaintiffs.

(b) Whether standard of care breached

[379] EY submits that it did not breach the standard of care expected of a professional reporting accountant in its position because EY correctly confirmed Aldwich's actual DSCR ratios using up to three months of estimated cash flow provided by Aldwich's management, resulting in the Actual DSCR being computed with three months of estimated figures and only nine months of actual figures. EY also submits that it was 'obvious' that estimated figures would be used given that s 167(1A) of the Companies Act 1965 allows companies up to 60 days to record their transactions — thus suggesting that up to two months' estimated figures could be used because the actual transactions would not have been entered into Aldwich's accounts until after the lapse of 60 days.

[380] The first argument on the use of estimated figures cannot be sustained. The express terms of the IM require actual DSCR to be calculated using actual figures and based on the actual balances in, inter alia, the DSRA. EY breached those terms by using estimated figures. Pushpanathan also conceded in cross-examination that EY never even checked the DSRA balance when issuing its DSCR confirmations:

TMT *Well, I put it to you that EY could not have properly carried out its*

duties as the certifier or confirmer of the DSCR accounts annually if EY was not aware of these payments.

KEN *We never confirmed on DSRA accounts*, if I'm not mistaken.

TMT Or certification. I mean whatever they are.

KEN *We only talk about the DSCR computations, right, for the 1.5 times factor. That's all.*

TMT Yes.

KEN *I don't look at the DSRA accounts to confirm the balance.* (Emphasis added.)

(NP8/Day 35/p 78 line 45 to p 80 line 2.)

[381] Secondly, Ravi testified that could have:

(a) simply used Aldwich's actual cash flow figures from its cash book. EY did not have to wait for Aldwich to record details of its transactions first; and more importantly; and

(b) subsequently reviewed its DSCR calculations once Aldwich's actual cash flow figures were available — which EY would have had access to in the course of its annual audits to ensure that the estimated figures were not wrong.

[382] Since EY did not do either of the two matters above, I am of the view that EY breached the standard of care expected of a prudent professuional reporting accounting.

(c) Causation

[383] EY contends that even if it was negligent in certifying Aldwich's DSCR ratios, this did not cause the plaintiffs' losses.

[384] With respect I disagree with the EY's contention for the reasons given by the plaintiffs:

(a) EY issued its 2008 DSCR confirmation in June 2008 certifying that Aldwich had an actual DSCR of 2.13 times (based on the three months' of estimated cash flow figures) when Aldwich's actual DSCR was below 1.5 times);

(b) had EY not done so, Mayban Trustee would have alerted all the bondholders, including the plaintiffs, that Aldwich was in breach of its bond covenants;

(c) in that case, Aseam would have become sole signatory to the disbursement account as at June 2008;

(d) part of the transfer of RM166.7m from Aldwich's disbursement account to AEM in 2008–2009 would not have occurred; and

(e) at least that sum of RM166.7m would have been available to be paid to the plaintiffs to mitigate their loss.

[385] For the above reasons I find there is a causal link between EY's certification of Aldwich's 2008 DSCR ratio and the plaintiffs' losses.

CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFFS

[386] EY contends the plaintiffs ought to be held contributorily negligent because they failed to exercise due care by:

(a) relying on EY without requesting any documents from EY such as the indicative valuation, annual DSCR confirmations or Aldwich's annual audited accounts; and

(b) the plaintiffs did not ensure that condition precedent 6 of the IM (which required a valuation of AEM's business by an independent valuer) was satisfied prior to the issuance of the bonds.

[387] With respect, I cannot accept EY's contentions. Firstly, it is undisputed that when Mayban Trustee (acting on the bondholders' request) actually wrote to EY to seek clarification on its 2009 DSCR calculation, EY refused to reply or provide any clarification whatsoever. EY in fact expressly stated that EY was engaged by Aldwich and refused to provide any information without Aldwich's consent, and sought at that stage to escape liability for its negligence by demanding a 'hold harmless' letter beforehand. Hence even if the plaintiffs had requested EY's documents prior to Aldwich's default, it is likely that EY would have similarly rejected these requests.

[388] Secondly, CP 6 of the IM was to be satisfied before the bond monies were disbursed to AEM. That occurred in August 2003 when the bonds were issued. Therefore it begs the question whether EY contending that the plaintiffs (some of whom only bought the bonds in 2005 and 2006) ought to have insisted on compliance of a condition precedent to an event which occurred before they purchased their bonds?

[389] In any event, the Plaintiffs would not have suspected that CP 6 was not complied with because all references in the IM (including Chapter 5 which EY co-authored, and which is a three page summary of EY's own indicative

valuation) are to a 'valuation'. The words 'Indicative Valuation' simply do not exist in the IM, which was the prospectus made available to the plaintiffs prior to their purchase of the bonds.

CONCLUSION

[390] For all the reasons stated above I find on a balance of probabilities the plaintiffs have proven their claim on all the causes of action mentioned in *para 117* above. In the circumstances I grant judgment for the plaintiffs in the sum of RM177,248,747.31 against the defendants in the following proportion:

(a) Aldwich, AEM and Kamalul — 100% liable; and

(b) Aseam, Mayban Trustees and EY — 50%, 30% and 20% liable respectively.

[391] Kamalul's counterclaim against the plaintiffs in the sum of RM556.5m is dismissed with costs.

[392] The issues of interest, costs and consequential order are to be addressed at the adjourned date fixed on 31 July 2017.

[393] I wish to place on record my gratitude to Mr Tommy Thomas, Mr Alan Gomez, Mr V Manokaran, Mr MR Kumar, Mr Robert Lazar and Mr Kelvin Seet for the detailed and persuasive submissions without which this judgment is not possible.

Judgment granted for plaintiffs in the sum of RM177,248,747.31 against defendants; and third defendant's counterclaim dismissed with costs.

Reported by Dzulqarnain Ab Fatar